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OFFICIAL EDITION

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

JEROME B. FISHER, REPORTER.

° **VOLUME CLXXVIII.**

1918.

**J. B. LYON COMPANY,
ALBANY, N. Y.**

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The tables published in vol. 108 and every tenth volume from vol. 110 contain causes passed upon from the issue of vol. 100 to January 1, 1916.

JEROME B. FISHER,
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CAUSES in which the decisions contained in the Appellate Division Reports have been passed upon by the Court of Appeals:

BOSSERT v. DHUY.....	166 App. Div. 251
<i>Judgment reversed and complaint dismissed: 221 N. Y. 342.</i>	
CITY OF YONKERS v. FEDERAL SUGAR REFINING Co.....	177 App. Div. 728
<i>Order reversed and petition dismissed: 221 N. Y. 206.</i>	
FIFTH AVENUE BUILDING Co. v. KERNOCHAN.....	178 App. Div. 19
<i>Order affirmed: 221 N. Y. 370.</i>	
FIRST CONSTRUCTION Co. v. STATE OF NEW YORK.....	174 App. Div. 560
<i>Order modified: 221 N. Y. 295.</i>	
GAVIN v. BOARD OF SUPERVISORS OF RENSSELAER Co....	174 App. Div. 900
<i>Judgment affirmed: 221 N. Y. 222.</i>	
MATTER OF CONNELL.....	175 App. Div. 986
<i>Order reversed and proceedings remitted to surrogate of New York county for a rehearing: 221 N. Y. 190.</i>	
MATTER OF DE NOYER v. CAVANAUGH.....	177 App. Div. 939
<i>Order affirmed: 221 N. Y. 273.</i>	
MATTER OF JAMES.....	172 App. Div. 800
<i>Order of Appellate Division reversed and decree of Surrogate's Court modified and as so modified affirmed: 221 N. Y. 242.</i>	
MATTER OF KAMMER v. HAWK.....	177 App. Div. 938
<i>Order reversed and claim dismissed: 221 N. Y. 378.</i>	
MATTER OF O'DONNELL.....	178 App. Div. 928
<i>Order of Appellate Division reversed and that of Special Term affirmed: 221 N. Y. 197.</i>	
MATTER OF SCHRIEVER.....	174 App. Div. 113
<i>Order modified and as so modified affirmed: 221 N. Y. 268.</i>	
MATTER OF SECURITY TRUST Co. OF ROCHESTER.....	178 App. Div. 909
<i>Order affirmed: 221 N. Y. 213.</i>	
MATTER OF SKOCZLOIS v. VINOCOUR.....	176 App. Div. 924
<i>Order of Appellate Division and award of Compensation Commission, so far as relates to insurance company reversed, and affirmed as to employer: 221 N. Y. 276.</i>	
OCHS v. WOODS.....	160 App. Div. 740
<i>Judgment reversed and case remitted to Appellate Division: 221 N. Y. 335.</i>	
PEOPLE v. VOGELGESANG.....	173 App. Div. 919
<i>Judgment affirmed: 221 N. Y. 290.</i>	
PEOPLE EX REL. CRANE v. ORMOND.....	178 App. Div. 151
<i>Order affirmed: 221 N. Y. 283.</i>	
PEOPLE EX REL. MOSS v. Bd. OF SUPERVISORS.....	178 App. Div. 716
<i>Appeal dismissed: 221 N. Y. 367.</i>	
PRICE v. COUNTY OF ERIE.....	163 App. Div. 437
<i>Judgment reversed and complaint dismissed: 221 N. Y. 260.</i>	

vi CAUSES PASSED UPON BY COURT OF APPEALS.

SCHMIDT <i>v.</i> MICHEL BREWING CO.....	164 App. Div. 385
<i>Judgment reversed and order of Trial Term affirmed: 221 N. Y. 228.</i>	
SILVERSTEIN <i>v.</i> STANDARD ACCIDENT INS. CO.....	178 App. Div. 891
<i>Judgment affirmed: 221 N. Y. 332.</i>	
STORRIER <i>v.</i> MOSIER & SUMMERS.....	166 App. Div. 968
<i>Judgment affirmed: 221 N. Y. 237.</i>	
UNION ESTATES CO. <i>v.</i> ADLON CONSTRUCTION CO.....	165 App. Div. 979
<i>Judgment of Appellate Division reversed and that of Trial Term modified:</i> 221 N. Y. 183.	
VILLAGE OF BATH <i>v.</i> MCBRIDE.....	163 App. Div. 714
<i>Judgment of Appellate Division reversed and that of trial court reinstated:</i> 221 N. Y. 231.	

The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in or dissented from the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.) — [RE].

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.	PAGE.		PAGE.
Abuza, Matter of.....	757	Anderson, Bienenzucht v.....	891
Acker, Merrill & Condit Co.,		Anderson v. Steinway & Sons...	507
Burkhardt v.....	913	Ansaldi Co., Inc., Shaw v.....	589
Adams, Halbe v.....	916	Antonopulos, People v.....	894
Adams, Matter of.....	957	Apfel, Amsterdam v.....	71
Ahrens v. Lefstein & Rosenfeld.	905	Appell v. Appell.....	916
Albert v. Street.....	918	Arnold v. Oliver.....	907
Alexander, Schwarz v.....	641	Ash v. United Toilet Goods Co.	890
Allen, Hall v.....	950	Askin, Loper v.....	163
Alphonsus, Sieber v.....	902	Associated Press, Hearst v.....	894
Altenkirch, People v.....	903	Athens Hotel Co., Dubois Mfg.	
Altman v. Kinstler.....	921	Co. v.....	918
Amalgamated Mills v. Gaston,		Atlanta Construction Co.,	
Williams & Wigmore.....	896	Petrilli v.....	952
Ament, Duffy v.....	920, 921	Atlantic & Flatbush Aves. (In	
American Bill Posting Co. v.		re Public Service Comm. First	
Springer.....	889	Dist.).....	928
American Blue Stone Co. v. Cohn		Atlantic Hygienic Ice Co.,	
Cut Stone Co.....	911	Meissner v.....	169
American Distilled Water Co.,		Attorney-General, Matter of,	
Guzzardi v.....	913	v. Taubenheimer.....	321
American Fidelity Co., Haas		Attorneys, Matter of.....	910, 957
Tobacco Co. v.....	267	Auburn Draying Co. v. Wardell.	270
American Museum of Safety,		Austro-Americana Steamship	
Tolman v.....	920	Co., Castiglione v.....	897
American National Bank of		Avitabile, Madden v.....	903, 926
Benton Harbor v. Brown....	908	Axelrod v. Levine.....	901
Ames v. New York Central R. R.			
Co.....	324, 946		
Amesbury v. Vacuum Oil Co....	945		
Amsterdam v. Apfel.....	71		
Anchor Realty Co. v. Bankers			
Trust Co.....	918		

B.

Backus, Matter of.....	957
Badger, Flynn v.....	941
Bagdon v. Philadelphia & Read-	
ing Coal & Iron Co.....	662

	PAGE.		PAGE.
Bailey v. Stafford, Inc.....	811	Bierstadt, Matter of.....	836
Baker, Bills v.....	480	Biggs v. Clapsattle.....	895
Baker v. Johnson.....	230	Bills v. Baker.....	480
Baker, Kobre Assets Corpora- tion v.....	62, 921	Bilyou, Manning Co. v.....	903
Baker, Matter of (Haven Ave.).	1	Biroh v. Sees.....	609
Balsamo, People v.....	899	Bishop, Van Valkenburgh v....	937
Bankers Trust Co., Anchor Realty Co. v.....	918	Black, New York Trust Co. v....	4
Bankers Trust Co., Clark v....	921	Blaine v. Thurn.....	491
Barney & Smith Car Co. v.		Blank v. Marine Basin Co., Inc.	666
Bliss Co.....	919	Blankenship v. O'Donnell.....	957
Barreto, Seagle v.....	925	Blansett v. Hinkley.....	949
Barrett, Finkelstein v.....	233	Bligh v. Straus. (2 cases).....	924
Batterson, Matter of.....	918	Blinkhorn, Frohman Amuse- ment Corporation v.....	431
Baumert v. Malkin.....	913	Bliss Co., Barney & Smith Car Co. v.....	919
Baxter v. De Kay.....	949	Blitz v. Wilson.....	901
Beard, Willett v.....	951	Block, People v.....	930
Beaver, Ringulescu v. (2 cases).	889	Block, People ex rel. New York Central R. R. Co. v.....	251, 945
Beck Shoe Co., Martin v. (2 cases).....	915	Blum v. Blum.....	917
Becker, Diehl v.....	12	Blumenthal & Co., Inc., Miller v.....	919
Bedell Co., Lookwood v.....	695	Bly, Matter of.....	957
Beer, Sondheimer & Co., Inc., Robertson v.....	881	Board of Health of New Rochelle v. Farrell.....	714
Behan, People v.....	930	Board of Supervisors of Oneida Co., People ex rel. Moss v..	716
Behrmann v. Seybel.....	862	Boland, Mastin v.....	421
Belfer v. City of New York. (2 cases).....	925	Boomhower Grocery Co., Pardy v.....	347
Bell-Fenwick v. Cypress Hills Cemetery.....	899, 904	Booth v. Knipe.....	423
Bendelari v. Whyte's, Inc.....	921	Bowden v. Lehigh Valley R. R. Co.....	413
Benger, People ex rel., v. Davis.	944	Boyle, People ex rel. Conklyn v.....	908
Benoliel v. Benoliel.....	913	Bradford, People v.....	371
Benson v. New York State Rail- ways.....	956	Bradford Co. v. Dunn. 889, 895,	916
Bergen v. Morton Amusement Co., Inc.....	400, 957	Bradley Contracting Co., Musicant v. (2 cases).....	914
Berry, Matter of.....	144	Bradley Contracting Co., Schwab v.....	917
Bertrand v. Oesting Building Co.....	905	Brady, Sanford v.....	939
Berzin v. Polonsky.....	894	Bragan v. Syracuse Lighting Co.....	949
Beskin, St. John v.....	935	Branch, Matter of.....	585
Bethlehem, Town of, Van Buren v.....	254	Brand v. Brand.....	822
Bewaher, Matter of.....	381	Breitung, Howard v.....	889, 897
Biderman v. Grimmel.....	927		
Bienenzucht v. Anderson.....	891		

TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
Brennan v. Philadelphia & Reading Coal & Iron Co....	920	Burns, Hagedorn-Merz Co. v. . .	483
Breslin, People v.	891	Burns, Katz Underwear Co. v. .	487
British America Assurance Co., Estates of Havemeyer Point v.	927	Burns, People v.	845
Broderick v. de Mesa.	669	Burns Bros. v. City of New York.	615
Bronnie v. New England Equitable Ins. Co.	331	Burroughs, Mitchell v.	930
Brookhaven, Town of (In re Hedges).....	899	Buse v. Millers National Ins. Co.	951
Brookhaven, Town of, v. Robinson.....	901, 924	Buse v. National Ben Franklin Ins. Co.	951
Brooklyn Bank v. Metropolitan Trust Co.	225	Buse v. Northwestern National Ins. Co.	951
Brooklyn Daily Eagle, Windram v.	890	Bush Terminal Buildings Co., Figliolini v.	933
Brooklyn Hebrew Orphan Asylum, Goodman v.	682	Butterfield v. State of New York.	292
Brooklyn Heights R. R. Co., Kern v.	907	Byers v. Flushovalve Co.	894
Brooks, Matter of.	905, 907		
Brown, American National Bank of Benton Harbor v.	908	C.	
Brown, Matter of.	558	Campbell v. International R. Co. (2 cases).....	951
Brown, Tilton v.	915	Campbell, Matter of.	911
Brown v. Wilson.	902	Campion, McCullough v.	943
Brown Brothers Co., Smith v. .	952	Canadian Knitting Mills, Greenberg v.	942
Brownell v. Brownell.	907	Cantor, Matter of.	957
Bruh v. Zimit.	921	Capello v. Merrick.	946
Bruno, Fash v.	941	Capes v. Capes.	895
Brush, Woody v.	698	Carberry, Federal Trust Co. v. .	917
Bryer v. Finnen.	671	Carey, People v.	909
Buehler, Meguin v.	926	Carey v. Toler.	892
Buell v. Liggett Co.	956	Carlomagno v. Cook.	937
Buffalo, City of, Johnson v. .	295, 957	Carnegie Trust Co., Lebaudy v.	614, 897
Buffalo Steam Pump Co., Voelker v.	954	Carney, Hosmer v.	955
Bull, People v.	916	Carney v. Penn Realty Co. .	904, 925
Bull, People ex rel., v. Miller..	900	Carp, Matter of.	946
Bullock v. Cooley.	933	Carpel, Matter of.	146
Bunce, Matter of.	954	Carpenter, Matter of.	165
Burchell v. Burchell.	924	Carroll v. City of New York. .	916
Burgard, Garro v.	302	Carter v. City of New York. . .	907
Burke v. Higgins.	816	Carter's Ink Co., Higgins v. . .	889
Burke v. Union Pacific R. R. Co.	783	Carvill v. Mirror Films, Inc. .	644
Burkhardt v. Acker, Merrill & Condit Co.	913	Carvill, People v.	897
		Case, Matter of.	957
		Case Hotel Co., Inc., Hurlock v.	890
		Casesa, Milkman v.	902
		Castiglione v. Austro-Americana Steamship Co.	897

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Castle Heights Water Co., Matter of, v. Price.....	687	City of New York, Matter of (Zerega Ave.).....	892
Casualty Co. of America, Hartigan v.....	942	City of New York, McLoughlin v.....	884
Catskill & Albany Steamboat Co., Ltd., Starke v.....	945	City of New York v. New York Steam Co.....	79
Central Hudson Steamboat Co., People ex rel., v. Miller.....	900	City of New York, New York, Westchester & Boston R. Co. v.....	893
Central R. R. of New Jersey, Kelly v.....	685	City of New York, O'Brien v..	920
Central Trust Co. v. Falck.....	922	City of New York, O'Connor v.	550
Chaitman, Zimit v.....	906, 927	City of New York, Parker Co. v.	918
Chamberlain, Matter of.....	911	City of New York, Planten v..	824
Chamberlain, Mayer v.....	326	City of New York, Rapsen v..	908
Charlton v. Hilton-Dodge Trans- portation Co.....	385	City of New York, Schmidt v. (2 cases).....	896
Chemical Importing & Mfg. Co., Stein v.....	892	City of New York, Schwalbach v.....	908
Chertoff v. Conners.....	955	City of New York, Spearin v..	898
Chesebrough, Folts v.....	952	City of New York, Stern v.....	916
Chew v. New York Central R. R. Co.....	950, 955	City of New York, Weber v...	893
Child v. Rushmore.....	920	City of Rochester (In re Joiner St.).....	911
Christgau v. Standard Fire Ins. Co. of New Jersey.....	948	City of Schenectady, Pratt v...	944
City of Buffalo, Johnson v..	295, 957	City of Watertown, Judge v...	909
City of New York, Belfer v. (2 cases).....	925	City of Watervliet, Leary v...	938
City of New York, Burns Bros. v.....	615	City of Watervliet, National Bank of Commerce of Rochester v.....	944
City of New York, Carroll v...	916	Clapp, Matter of.....	901
City of New York, Carter v...	907	Clapsattle, Biggs v.....	895
City of New York, Cleveland Trinidad Paving Co. v.....	918	Clare v. New York Life Ins. Co.	877
City of New York, Crittenton Co. v.....	824	Clark v. Bankers Trust Co.....	921
City of New York, Ellman v...	920	Clark v. Johnson.....	934
City of New York, Flaxman v.	935	Clark, Matter of.....	934
City of New York, Fougere & Co., Inc., v.....	824	Clark v. Pennsylvania R. R. Co.	949
City of New York, Johnson v..	928	Clarke v. Moerlbach Sales Co..	891
City of New York, Kavanagh v.	936	Cléveland Trinidad Paving Co. v. City of New York.....	918
City of New York, Lewis v...	929	Clifford v. Mongan.....	941
City of New York, Magrath v.	929	Cody v. Davis.....	902
City of New York, Matter of (Juniper Ave.) (2 cases)....	905	Cohen, Fox v.....	891
City of New York, Matter of (Whitlock Ave.) (2 cases)...	896	Cohen, Horowitz v.....	926
		Cohen, Tibbits v.....	680
		Cohn v. Howlett & Hockmeyer Co., Inc.....	917
		Cohn Cut Stone Co., American Blue Stone Co. v.....	911

TABLE OF CASES REPORTED.

xi

PAGE.	PAGE.
Coldwell Lawn Mower Co., People ex rel., v. Miller.....	Crittenton Co. v. City of New York.....
900	824
Coleman, Matter of.....	Crombie v. O'Brien.....
580	807
Collia, D'Astoli v.....	Cronin v. O'Leary.....
951	909
Colon & Co. v. Smith.....	Cropsey, People ex rel. Tappin v.
100	180
Columbia Trust Co., Robin- son v.....	Cross & Brown Co., Gerard v..
945	612
Commissioners of Palisades Interstate Park, Ramapo Mountains Water, Power & Service Co., Inc., v. (Nos. 1 & 2).....	Crozier v. Richardson.....
924	927
Compagnie Generale Trans- atlantique, Hudson Building v.	Cummings v. Johnson Construc- tion Co.....
889	942
Comstock v. Ellinger.....	Curry v. Zitelli.....
916	925
Coney Island & Gravesend R. Co., Wulp v.....	Cypress Hills Cemetery, Bell- Fenwick v.....
902	899, 904
Conklin, People ex rel., v. Boyle.	
908	
Conklin, Town of, Rose v....	
944, 947	
Connell v. Coolidge.....	
919	
Connors, Chertoff v.....	
955	
Connor, Matter of.....	
955	
Cook, Carlomagno v.....	
937	
Cook v. Shattle.....	
908	
Cooley, Bullock v.....	
933	
Coolidge, Connell v.....	
919	
Coombs Aeroplane Co., Inc., Ramsdell v.....	
910	
Cooper Co. v. Wolf.....	
933	
Corcoran, Kamenitsky v.....	
897	
Corcoran, Matter of.....	
957	
Corico v. Smith.....	
33	
Correa, Ohlbaum v.....	
838	
Corsun, Matter of Reisenburger v.....	
932	
Cottle, Perham v.....	
949	
Countryman, Nellis v.....	
947	
Coverdale, Lasky v.....	
922	
Cox, Hannevig v.....	
915	
Coyle, Matter of.....	
957	
Craft v. Knass.....	
933	
Crane, People ex rel., v. Or- mond.....	
151, 922	
Crawford v. Dexter.....	
764	
Crawford's Transfer, Levinson v.	
889	
Creamery Package Mfg. Co. v. Horton.....	
467	
Crear, Smith v.....	
902	
	D.
	D'Astoli v. Collia.....
	951
	Dahler v. Pennsylvania R. R. Co.....
	956
	Dake Realty Corporation, Daly v.....
	909, 955
	Dalrymple v. Schwartz.....
	921
	Daly v. Dake Realty Corpora- tion.....
	909, 955
	Dampkowski v. Mosier & Sum- mers.....
	953
	Daniels Co., Ringelmann v....
	935
	Dannemora, Village of, Mitchell v.....
	239
	Davenport, Turrill v.....
	935
	Davidson Co. v. Hoffmann- LaRoche Chemical Works...
	855
	Davidson v. Ream.....
	362, 945
	Davis, Cody v.....
	902
	Davis, Hall v.....
	953
	Davis, Matter of.....
	957
	Davis, People ex rel. Benger v.
	944
	Davis, Shaw v.....
	890
	Davis Mfg. Co., Wood & Brooks Co. v.....
	947
	De Kay, Baxter v.....
	949
	De Lamar, Schaeffer v.....
	904
	de Mesa, Broderick v.....
	669
	de Moro v. Tull.....
	17
	De Mun v. Hirsh.....
	953
	de Ridder, Matter of.....
	917
	Delaware & Hudson Co., Knight v.....
	518
	Delaware, Lackawanna & Western R. R. Co., Dobbins v.
	941

	PAGE.		PAGE.
Delaware, Lackawanna & Western R. R. Co., O'Hara v.	956	Duval v. Depositors Assets Corporation.....	899
Delfino v. Marine Metal & Supply Co., Inc.....	903	Duval v. Massachusetts Bond- ing & Ins. Co.....	909
Demuth v. Hellman.....	919		
Dennedy v. Hirsch.....	891	E.	
Depositors Assets Corporation, Duvall v.....	899	Eastman Kodak Co., Joyce v....	911
Dexter, Crawford v.....	764	Eastman Machine Co. v.	
Dexter Sulphite Pulp & Paper Co., Mieduszewski v.....	949	Zuck.....	951, 957
Di Fazzio v. Hewitt Rubber Co.	950	Ebin v. Equitable Life Assurance Society.....	897
Diamond Mills Paper Co., McNally v.....	342	Eckman v. Lindbeck.....	720
Dickson, Matter of.....	911	Economy Fuse & Mfg. Co. v. Lacount.....	919
Diehl v. Becker.....	12	Edison Electric Illuminating Co. of Brooklyn v. Thacher.....	924
Dilg, Hall v.....	891	Edson v. International R. Co. (2 cases).....	955
Dinunny v. Reavis.....	922	Edwards v. People.....	949
Dirimijio v. Empire Engineer- ing Corporation.....	954	Egloff v. Tanger.....	908
Disston & Sons, Inc., Singer v.	108	Eidlitz, Kellner v.....	657
Dithridge, Johnson v.....	884	Eighty-sixth Street Amusement Co., Stamp v.....	893, 921
Dobbins v. Delaware, Lacka- wanna & Western R. R. Co.	941	Eisenberg v. Lustgarten.....	915
Dodge, Levey v.....	890	Elder, Hume v.....	652
Doerfler v. Pottberg.....	899	Ellers v. Erie R. R. Co.....	298
Donovan Co., Henderson v....	946	Ellinger, Comstock v.....	916
Doolittle, People's Trust Co. v.	802	Ellman v. City of New York...	920
Dorfman, Mintz v.....	921	Elmore, Frank & Miller, Inc., v.	910
Doud v. Huntington Hebrew Congregation of Huntington.	748	Emerson Building Co., Forbes & Co., Inc., v.....	917
Douglass, People ex rel. New York Central R. R. Co. v....	956	Empire Engineering Corpora- tion, Dirimijio v.....	954
Doull Miller Co. v. Salmowitz.	916	Empire Tinware Co., Kassel v..	176
Drumm, Matter of.....	910	Equitable Life Assurance Society, Ebin v.....	897
Du Bois v. Lewis.....	951	Eriksen v. Tidewater Paper Mills Co.....	903
Dubois Mfg. Co. v. Athens Hotel Co.....	918	Erickson, Hirsch v.....	895
Duffy v. Ament.....	920, 921	Erie R. R. Co., Ellers v.....	298
Duke, Interstate Chemical Co. v.....	892	Erie R. R. Co., Miller v.....	949
Duncan Co., Inc., v. Hemsley & Co., Ltd.....	882	Erie R. R. Co., Pearsall v....	908
Dunn, Bradford Co. v.	889, 895, 916	Erie R. R. Co., People ex rel., v. Miller.....	900
Dunsmure v. Hotel Shelburne, Inc.....	904, 935	Erie R. R. Co., Smith v.....	931
Durolithic Co., Wittman v.	909, 951	Erie R. R. Co., Sturtevant Co. v.	944
Duval Co., Okun v.....	913	Erie R. R. Co., Van Arsdale v.	952
		Esser v. Hunter-Tuppen Co....	951

TABLE OF CASES REPORTED.

xiii

PAGE.	PAGE.
Estates of Havemeyer Point v.	Flagler, Service v. 918
British America Assurance Co. 927	Flanagan, People v. 891
Esterson v. Ostrander & Co.,	Flaum v. Picaretto. 952
Inc. 896	Flaxman v. City of New York. 935
Extraordinary Special & Trial	Fleischer & Co., Inc., v. Gerli. 921
Term, Supr. Ct., People ex rel.	Fleischmann, Froude v. 257
Saranac Land & Timber Co.	Flushovalve Co., Byers v. 894
v. 910	Flynn v. Badger. 941
F.	Flynn, Peoples Trust Co. v. 926
Fach, Nolan v. 115	Flynn, Roache v. 926
Fainor v. Fainor. 905	Foley, Henning v. 946
Falek, Central Trust Co. v. 922	Folts v. Chesebrough. 952
Farrell, Board of Health of New	Forbes & Co., Inc., v. Emerson
Rochelle v. 714	Building Co. 917
Farrell, Lawton v. 376	Forman, Matter of Field v. 932
Farson, First National Bank of	Forman Bottling Co., Wittemann
Ann Arbor, Mich., v. 135	Brothers v. 674
Fash v. Bruno. 941	Fougere & Co., Inc., v. City of
Fass v. Illinois Surety Co. 916	New York. 824
Fay v. Herald Co. 892, 919	Fox v. Cohen. 891
Federal-Huber Co., Thompson-	Fox, Matter of. 897
Starrett Co. v. 914	Franciscan Fathers of the Church
Federal Trust Co. v. Carberry. 917	of the Assumption, Wenz
Feldman, Matter of. 924, 935	v. 949, 955
Ferguson, Inwald Glass Co.,	Frank v. Vogt. 833
Inc., v. 918	Frank & Miller, Inc., v. Elmore. 910
Fetherston, People ex rel.	Frankenberg v. Spiegel. 890
Jacobs v. 934	Frantz Mfg. Co. v. Perry. 941
Fidelity Mutual Life Ins. Co.,	Frazee & Co., Inc., Vance v. 947
Quast v. 908	Freeland, Matter of. 910, 950
Field, Matter of. 922	Freeman v. Hanna. 630
Field, Matter of, v. Forman. 932	Fried v. New York, New Haven
Fifth Avenue Building Co. v.	& H. R. R. Co. 309
Kernochan. 19	Frohman Amusement Corpora-
Figliolini v. Bush Terminal	tion v. Blinkhorn. 431
Buildings Co. 933	Froude v. Fleischmann. 257
Finkelstein v. Barrett. 233	Fuchs, People ex rel. West-
Finkle v. Lasher. 471	chester Lighting Co. v. 904
Finnen, Bryer v. 671	
First National Bank of Ann	G.
Arbor, Mich., v. Farson. 135	G. & M. Improvement Co.,
Fisher, Morland Mortgage Co.	Moubray v. 737
v. 898, 915	Gabel v. Partridge. 941
Fisher, Van Wagenen v. 898	Gair Co. v. Harris Co. 937
Fisher, Wagener v. 915	Gallagher v. Surpress. 933
Fishman, Mankes v. 943	Gallo, Marino v. 943
Fitzgerald, Greene v. 941	Galschinski v. Postal Telegraph-
	Cable Co. 957

	PAGE.		PAGE.
Gamble, Simcoe v.	947	Goodman v. Brooklyn Hebrew	
Gardner, People v.	947	Orphan Asylum.	682
Garfield Worsted Mills, Randall		Goodman v. Melrose Fireproof	
& Sons, Inc., v.	196	Storage Warehouse Co.	916
Garno v. Burgard.	302	Gorham Mfg. Co., Naulty v.	36
Garrabrant, Matter of.	23	Granbery v. Taylor.	913
Gaston, Williams & Wigmore,		Graves v. Hersperger.	950
Amalgamated Mills v.	896	Gravier, Meeks v.	896
Gatcomb v. State of New York.	941	Greeley Square Hotel Co., Radt	
Gates, Thorburn v.	916	v.	889, 917
General Railway Signal Co.,		Green v. International R. Co. ...	954
Pointon v.	955	Greenberg v. Canadian Knitting	
Genntison v. Genntison.	918	Mills.	942
Geoppner v. Henning.	943, 946	Greene v. Fitzgerald.	941
Gerard v. Cross & Brown Co.	612	Greenhut & Co., Matter of.	895
Gerdau Co. v. Herbert.	897		917
Gerli, Fleischer & Co., Inc., v.	921	Greenwood v. Lehigh Valley R.	
Gerry, People ex rel., v. Woods.	902	R. Co.	910, 951
Giddings, People v.	956	Gregory v. Lennon.	954
Giebel, Stiner v.	902	Gregory, People v.	930
Giesen v. Metzler.	858	Griffin, Teed v.	920
Gilechrist v. Stoddard.	941	Grimmel, Biderman v.	927
Giles, Hirsch v.	933	Grosser v. New York, Ontario	
Gilleran, Lyon v.	932	& Western R. Co.	956
Gillette v. International R.		Groves v. Warren.	333
Co.	952, 953	Gugel v. Hiscox.	901, 907
Gillig, Mohr v.	934	Guipe, People v.	915
Ginsberg v. Sherman.	897	Guntzer v. Healy.	892
Gisnet v. Moeckel.	912	Gurney Elevator Co. v. Proctor	
Glasser, Zweig v.	927	Mt. Vernon Realty Co.	921
Gleeksman, People v.	882	Guzzardi v. American Distilled	
Glenalla Realty Corporation v.		Water Co.	913
Starr Piano Co.	920		
Glenville, Town of, v. State of			
New York.	945		
Globe-Wernicke Co., Morrow v.	934		
Gloger, Matter of.	911		
Gloss v. Meger.	954		
Goldberg v. London & Lan-			
cashire Indemnity Co. of			
America.	86		
Goldberg v. Popular Pictures			
Corporation.	86		
Goldenberg v. Jacobson.	932		
Goldfarb, Matter of.	914		
Goldsborough v. Staab.	935		
Goldsmith & Co., Inc., Wolffsohn			
v. (2 cases).	920		

H.

Haag, Matter of.	895
Haas Tobacco Co. v. American	
Fidelity Co.	267
Hagaman, Matter of.	957
Hagedorn-Merz Co. v. Burns.	483
Halbe v. Adams.	916
Hale, People v.	926
Hall v. Allen.	950
Hall v. Davis.	953
Hall v. Dilg.	891
Hamilton v. Long Island R. R.	
Co. (2 cases).	933
Hamilton v. Murray.	896
Hamilton v. Rouse.	81

TABLE OF CASES REPORTED.

xv

PAGE.	PAGE.
Hamm, Ravold v.	925
Hammill v. Order of United Commercial Travelers of America	338
Hampel v. Mozambique Trading & Plantation Co.	918
Hand, Weeker v.	889
Haness v. Haness	927
Hanna, Freeman v.	630
Hannevig v. Cox	915
Hanover Fire Ins. Co., Sharlet v.	374
Hardin v. Robinson	724
Harris, Hubbell v.	898
Harris, Matter of	928
Harris Co., Gair Co. v.	937
Harris Raincoat Co., Yamin v. .	945
Harrison, Lang v.	894
Hart, Matter of	922
Hartigan v. Casualty Co. of America	942
Hartley v. Ringer	955
Harvey v. Hickman	956
Hassett v. Rathbone	946
Hastorf, Horan v.	888
Hauff v. Kalmanor	937
Havemeyer Point, Estates of, v. British America Assurance Co.	927
Haven Avenue (In re Baker) . . .	1
Hayes, People ex rel. Mott Wheel Works v.	301
Hayward v. Hayward	92, 913
Hazard, Matter of	932
Head v. John Hancock Mutual Life Ins. Co. of Boston	936
Healy, Guntzer v.	892
Hearst v. Associated Press	894
Heath, Hunt v. (2 cases)	934
Hecker v. Ocean Electric R. Co.	933
Hedden v. Hedden	957
Hedges, Matter of (Town of Brookhaven)	899
Hegstad v. Wysiecki	733
Heim, Matter of	957
Hellman, Demuth v.	919
Hemaley & Co., Ltd., Duncan Co., Inc., v.	882
Henderson v. Donovan Co.	943
Henning v. Foley	946
Henning, Geoppner v.	943, 946
Herald Co., Fay v.	892, 919
Herbert, Gerdaul Co. v.	897
Herbert, Matter of	905
Hermann, Matter of	182
Herrman, Matter of	892
Hersperger, Graves v.	950
Hervey v. Tilyou	917
Hess v. Ribstein-Holter Co., Inc. (2 cases)	950
Hessler v. New York Railways Co.	921
Hewitt Rubber Co., Di Fazio v.	950
Hickey, Matter of	957
Hickman, Harvey v.	956
Hickson, Inc., Montegut v. . . .	94
Hidecker, Matter of	909
Hiers v. Hull & Co.	350
Higgins, Burke v.	816
Higgins v. Carter's Ink Co. . . .	889
Higgs v. New York Central & H. R. R. R. Co.	949
Hilltop Automobile Station, Inc., Ormsby v.	892
Hilton-Dodge Transportation Co., Charlton v.	385
Hinchman Co., McKay v.	942
Hinds, Matter of	957
Hinkley, Blansett v.	949
Hirsch, Dennedy v.	891
Hirsch v. Erickson	895
Hirsch v. Giles	933
Hirsch, People v.	914
Hirschhorn, Schatz v.	921
Hirsh, De Mun v.	953
Hiscox, Gugal v.	901, 907
Hoffman, People v.	915
Hoffman v. Town of North Hempstead	889
Hoffmann-LaRoche Chemical Works, Davids Co. v.	855
Hogan, Matter of	911
Hoge, Maxwell v.	936
Holbrook, Sherwood v.	462
Holbrook, Cabot & Rollins Cor- poration, Overlander v.	890

PAGE.	I.	PAGE.
Holland, Weir v. 937	Illinois Surety Co., Fass v. 916	
Holler, Lindquest v. 317	Illinois Surety Co., Matter of	
Holmes v. Saint Joseph Lead Co. 914	Pelella v. 920	
Holzman, Cohen & Co., Inc.,	Improvement Co., Moubray v. ... 737	
Kaufmann v. 893	Ingalls Stone Co. v. State of New	
Honig, Rubel v. 53	York. 942	
Hoppe, People v. 930	Ingersoll & Bro., McDermott	
Horan v. Hastorf. 888	v. 943, 946	
Horowitz v. Cohen. 926	Interborough Rapid Transit Co.,	
Horowitz, Levy v. 934	Todd v. 893	
Horton, Creamery Package Mfg.	International Harvester Co. of	
Co. v. 467	America v. Oltz. 942	
Hosley, Matter of. 943	International R. Co., Campbell	
Hosmer v. Carney. 955	v. (2 cases). 951	
Hotel Shelburne, Inc., Dunsmure	International R. Co., Edson v.	
v. 904, 935	(2 cases). 955	
Hottenroth v. Mickey. 742	International R. Co., Gillette	
Howard v. Brietung. 889, 897	v. 952, 953	
Howard v. Maxwell-Briscoe	International R. Co., Green v. ... 954	
Motor Co. 916	International R. Co., Osborne v. 950	
Howell, Matter of. 926	International R. Co., Tepas v. ... 954	
Howell, People ex rel. Tuthill	International R. Co., Trapp v. ... 954	
v. 904	International Trust Co., Lesser	
Howlett & Hockmeyer Co., Inc.,	v. 892	
Cohn v. 917	Interstate Chemical Co. v. Duke. 892	
Hoyt, Matter of. 570	Inwald Glass Co., Inc., v. Fer-	
Hubbard v. Syenite-Trap Rock	guson. 918	
Co. 531	Iroquois Rubber Co. v. Male. ... 910	
Hubbell v. Harris. 898	Israel v. Uhr. 891	
Hudson Building v. Compagnie	Ivey, Waterbury Wallace Co.	
Generale Transatlantique. ... 889	v. 891	
Hull & Co., Hiers v. 350		
Hume v. Elder. 652		
Hummerich, Ratz v. (2 cases). 936		
Humphreys' Homeopathic Medi-		
cine Co., Jones v. 893		
Hunt v. Heath. (2 cases). 934		
Hunt v. Kreyer. 914		
Hunter-Tuppen Co., Esser v. ... 951		
Huntington Hebrew Congrega-		
tion of Huntington, Doud v. ... 743		
Hurley v. Pittsburgh Plate Glass		
Co. 927		
Hurlock v. Case Hotel Co., Inc. 890		
Hutchins v. Hutchins. 942		
Hyde Park Flint Bottle Co. v.		
Miller. 897		
	J.	
	Jackson v. Schwartz. 903	
	Jackson, Southard v. (2 cases). 906	
	Jacobs, People ex rel., v. Fether-	
	ston. 934	
	Jacobson, Goldenberg v. 932	
	Jamaica Estates, Neustadt v. ... 902	
	James v. Ladue. 918	
	Jamestown Electric Mills, Inc.,	
	People v. 950	
	Jennings Street (In re School	
	Site). 898	
	Jepson, Mason v. 949	
	John Hancock Mutual Life Ins.	
	Co. of Boston, Head v. 936	

TABLE OF CASES REPORTED.

xvii

PAGE.	PAGE.
Johnson, Baker v. 230	Kennedy v. Kennedy Mfg. & Engineering Co. 946
Johnson v. City of Buffalo. 295, 957	Kennedy, Obermeyer & Liebmann v. 924
Johnson v. City of New York. 928	Kennedy, Vetault v. 228
Johnson, Clark v. 934	Kennedy Mfg. & Engineering Co., Kennedy v. 946
Johnson v. Dithridge. 884	Kenney, Matter of. 926
Johnson Construction Co., Cummings v. 942	Kenny v. Stewart. 893
Joiner Street, Matter of (City of Rochester). 911	Kern v. Brooklyn Heights R. R. Co. 907
Jones v. Humphreys' Homeopathic Medicine Co. 893	Kernochan, Fifth Avenue Building Co. v. 19
Jones, Matter of (West Eleventh St.). 654	Kerr v. Ward. 893
Jorgansborg v. Lumber Operating & Mfg. Co. 929	Keys, People ex rel. Misses Masters School v. 677
Josef Inwald Glass Co., Inc., v. Ferguson. 918	Kidney v. Waite. 280
Joseph v. Joseph. 898, 912, 917	Killilea v. Morgan. 924, 932
Joyce v. Eastman Kodak Co. 911	King, Matter of. 932, 957
Judge v. City of Watertown. 909	King v. Scott. 903
Juniper Avenue (In re City of New York). (2 cases). 905	King Sewing Machine Co., Naud v. 31, 955
Junk v. Terry & Tench Co. 898	Kings County Lighting Co., People ex rel., v. Straus. 840, 922
Justices of Supreme Court, Second Dept., Matter of. 901	Kingsbury v. Sternberg. 435
K.	
Kaiser v. Parker. 894	Kinkel, Matter of. 911, 957
Kalmanor, Hauff v. 937	Kinnear v. Kinnear. 905
Kamenitaky v. Corcoran. 897	Kinstler, Altman v. 921
Keppenberg v. Yawger. 947	Kittanning Face Brick Co., Inc., v. Peart. 895
Kassel v. Empire Tinware Co. 176	Klatt v. Klatt. 926
Kates, Solomon v. 915	Knass, Craft v. 933
Katz Underwear Co. v. Burns. 487	Knickerbocker, Walter v. 954
Kaufmann v. Holzman, Cohen & Co., Inc. 893	Knickerbocker Ice Co., Ronsheim v. 897
Kavanagh v. City of New York. 936	Knight v. Delaware & Hudson Co. 518
Kazubowski, Matter of. 957	Knipe, Booth v. 423
Kellner v. Bidlitz. 657	Knoblock v. Stringer. 934
Kellner v. Shelley. 657	Knox, Matter of. 902
Kellner v. Wesley. 657	Kobre Assets Corporation v. Baker. 62, 921
Kellogg, Simers v. 881	Koenig v. Lawler. 952
Kelly v. Central R. R. of New Jersey. 685	Kohn v. Warner. 921
Kelly v. Washburn. 664	Kohut v. Schoor. 891
Kendall v. Schnauffer. 917	Kolinski, Olszewski v. 924

	PAGE.		PAGE.
Kowalski v. New York Central & H. R. R. Co.....	953	Leventhal, Weber-Peuthert Co. v.....	952
Krause v. Phillips.....	905	Levey v. Dodge.....	890
Kreyer, Hunt v.....	914	Levin, Schwartz v.....	914
Krieger, Matter of.....	911	Levine, Axelrod v.....	901
Krohn, Reimann v.....	910	Levinson v. Crawford's Transfer.	889
Kuntz, Matter of.....	911	Levitt v. Levitt.....	899
Kurak v. Traiche.....	952	Levy v. Horowitz.....	934
		Lewis v. City of New York....	929
L.		Lewis, Du Bois v.....	951
La Fleur v. Wood.....	397	Lewis v. Morris.....	893
La Point, People v.....	908	Liggett Co., Buell v.....	956
Lacount, Economy Fuse & Mfg. Co. v.....	919	Linch, Ringulescu v. (2 cases).	889
Ladew Co., Inc., Schulder v....	458	Lindbeck, Eckman v.....	720
Ladue, James v.....	918	Lindquest v. Holler.....	317
Landers, Ticknor v.....	945	Liverpool & London & Globe Ins. Co., Ltd., Neal, Clark & Neal Co. v.....	730
Landes v. Landes.....	917	Livingston, Matter of.....	890, 922
Lang v. Harrison.....	894	Livote, People v.....	903
Langdon v. Town of Newfane..	909	Loades, White v.....	236
	957	Lookwood v. Bedell Co.....	695
Lanphear v. Partridge.....	910, 952	Loewenthal, Weinhandler v....	890
Lanternier, Wolff v.....	892	London & Lancashire Co., Laun- dry v.....	897
Larnard, Riegel v.....	355	London & Lancashire Indemnity Co. of America, Goldberg v...	86
Lasher, Finkle v.....	471	Long Island R. R. Co., Hamilton v. (2 cases).....	933
Lasky v. Coverdale.....	922	Long Island R. R. Co., Ramme v.....	904
Laundry v. London & Lanca- shire Co.....	897	Long Island R. R. Co., Wilson v.....	799
Lawler, Koenig v.....	952	Loper v. Askin.....	163
Lawson, People v.....	224	Lorenzo v. Manhattan Steam Bakery, Inc.....	706
Lawton v. Farrell.....	376	Lotbiniere Lumber Co. v. United Paperboard Co.....	942
Lawyers Title & Trust Co., Matter of, v. Rothschild.....	919	Lumber Operating & Mfg. Co., Jorgansborg v.....	929
Le Boy, People v.....	930	Luna Amusement Co., People v.	797
Leary v. City of Watervliet....	938	Lustgarten, Eisenberg v.....	915
Lebaudy v. Carnegie Trust Co..	614	Lynch v. Orient Ins. Co.....	953
	897	Lynett v. Sea Beach R. Co.....	112
Lefstein & Rosenfeld, Ahrens v.	905	Lyon v. Gilleran.....	932
Lehigh Valley R. R. Co., Bow- den v.....	413	Lyon, Stein v.....	892
Lehigh Valley R. R. Co., Green- wood v.....	910, 951	Lysander, Town of, Murgittroyd v.....	949
Lehigh & Wilkesbarre Coal Co., Mikelonis (Milionis) v.....	903		
Lennon, Gregory v.....	954		
Lesser v. International Trust Co.	892		
Lesster v. Lester.....	438		
Lester v. Lester.....	205		

TABLE OF CASES REPORTED.

xix

M.		PAGE.		PAGE.
Macey, Snyder v.....	947	Matter of Abuza.....	757	
Mackey, Murphy v.....	889	Matter of Adams.....	957	
Madden v. Avitabile.....	903, 926	Matter of Attorney-General v.		
Madden v. Schloffel.....	894	Taubenheimer.....	321	
Magrath v. City of New York..	929	Matter of Attorneys.....	910, 957	
Mahan, Matter of.....	916	Matter of Backus.....	957	
Maier v. Maier.....	915	Matter of Baker (Haven Ave.)..	1	
Mailler, People ex rel., v. Miller.	900	Matter of Batterson.....	918	
Male, Iroquois Rubber Co. v...	910	Matter of Berry.....	144	
Malkin, Baumert v.....	913	Matter of Bewsher.....	381	
Mallett v. Prendergast.....	894	Matter of Bierstadt.....	836	
Malley, Nolan v.....	913	Matter of Bly.....	957	
Manhattan R. Co., Matter of, v.		Matter of Branch.....	585	
Reiche.....	894	Matter of Brooks.....	905, 907	
Manhattan Savings Institution,		Matter of Brown.....	558	
Szvento Juozupo Let Draug-		Matter of Bunce.....	954	
ystes (St. Joseph Society) v..	57	Matter of Campbell.....	911	
Manhattan Shirt Co., Spain v..	921	Matter of Cantor.....	957	
Manhattan Steam Bakery, Inc.,		Matter of Carp.....	946	
Lorenzo v.....	706	Matter of Carpel.....	146	
Mankes v. Fishman.....	943	Matter of Carpenter.....	165	
Manning Co. v. Bilyou.....	903	Matter of Case.....	957	
Marco, People v.....	915	Matter of Castle Heights Water		
Marcotte & Co., Winters v.....	943	Co. v. Price.....	687	
Marine Basin Co., Inc., Blank v.	666	Matter of Chamberlain.....	911	
Marine Ins. Co., Ltd., Salzano		Matter of City of New York		
v.....	948	(Juniper Ave.). (2 cases)....	905	
Marine Metal & Supply Co.,		Matter of City of New York		
Inc., Delfino v.....	903	(Whitlock Ave.). (2 cases)...	896	
Marino v. Gallo.....	943	Matter of City of New York		
Maronna, People v.....	899	(Zerega Ave.).....	892	
Martin v. Beck Shoe Co. (2		Matter of Clapp.....	901	
cases).....	915	Matter of Clark.....	934	
Martin, Matter of.....	957	Matter of Coleman.....	580	
Martin, Mott v.....	914	Matter of Connor.....	955	
Martin v. Rosengarten (2		Matter of Corcoran.....	957	
cases).....	934	Matter of Coyle.....	957	
Martin v. Security Ins. Co.....	949	Matter of Davis.....	957	
Maryland Casualty Co., Syra-		Matter of de Ridder.....	917	
cuse Lighting Co. v.....	908	Matter of Dickson.....	911	
Masloska, Matter of.....	951	Matter of Drumm.....	910	
Mason v. Jepson.....	949	Matter of Feldman.....	924, 935	
Massachusetts Bonding & Ins.		Matter of Field.....	922	
Co., Duvall v.....	909	Matter of Field v. Forman.....	932	
Mastin v. Boland.....	421	Matter of Fox.....	897	
Matheson, Stainton v.....	926	Matter of Haag.....	895	
Mathot, Matter of.....	759	Matter of Hagaman.....	957	

PAGE.	PAGE.
Matter of Harris..... 928	Matter of Moebus..... 709
Matter of Hart..... 922	Matter of Mullen..... 957
Matter of Hazard..... 932	Matter of O'Donnell..... 928
Matter of Hedges (Town of Brookhaven)..... 899	Matter of Pelella v. Illinois Surety Co..... 920
Matter of Heim..... 957	Matter of People ex rel. Rea v. Prendergast..... 930
Matter of Herbert..... 905	Matter of Petheram..... 953
Matter of Hermann..... 182	Matter of Phillies..... 911
Matter of Herrman..... 892	Matter of Pike..... 897
Matter of Hickey..... 957	Matter of Pitcher..... 911
Matter of Hidecker..... 909	Matter of Pollock..... 577
Matter of Freeland..... 910,	Matter of Public Service Comm., First Dist. (Atlantic & Flat- bush Aves.)..... 928
Matter of Garrabrant..... 23	Matter of Purcell..... 911
Matter of Gloger..... 911	Matter of Quimby..... 893
Matter of Goldfarb..... 914	Matter of Raymond..... 897
Matter of Greenhut & Co. 895,	Matter of Real Estate Owners Protective Assn..... 915
Matter of Hinds..... 957	Matter of Reed..... 942
Matter of Hogan..... 911	Matter of Reisenburger v. Cor- sun..... 932
Matter of Hosley..... 943	Matter of Rini..... 890
Matter of Howell..... 926	Matter of Robbins..... 957
Matter of Hoyt..... 570	Matter of Roberts..... 911
Matter of Joiner Street (City of Rochester)..... 911	Matter of Rogerson..... 911
Matter of Jones (West Eleventh St.)..... 654	Matter of Rooney..... 896
Matter of Justices of Supreme Court, Second Department... 901	Matter of Rutherford..... 920
Matter of Kazubowski..... 957	Matter of Sanborn. (2 cases).. 896
Matter of Kenney..... 926	Matter of Schaefer..... 117
Matter of King..... 932,	Matter of School Site (Jennings St.)..... 898
Matter of Kinkel..... 911,	Matter of Schoonover..... 957
Matter of Knox..... 902	Matter of Sebring..... 953
Matter of Krieger..... 911	Matter of Security Trust Co. of Rochester..... 909
Matter of Kuntz..... 911	Matter of Sessions..... 957
Matter of Lawyers Title & Trust Co. v. Rothschild..... 919	Matter of Sickmon..... 957
Matter of Livingston..... 890,	Matter of Smith. (2 cases).... 911
Matter of Mahan..... 916	Matter of State Board of Law Examiners..... 957
Matter of Manhattan R. Co. v. Reiche..... 894	Matter of Stearns..... 911
Matter of Martin..... 957	Matter of Stedman..... 911
Matter of Masloska..... 951	Matter of Stumbo..... 957
Matter of Mathot..... 759	Matter of Sweeny..... 780, 895, 898
Matter of McCusker..... 896	Matter of Taylor..... 911
Matter of McDowell..... 243	Matter of Teller..... 450
Matter of Merritt..... 911	
Matter of Mitchell v. Prender- gast..... 690	

TABLE OF CASES REPORTED.

xxi

PAGE.	PAGE.
Matter of Thedford v. Rouyon.. 928	McNally v. Diamond Mills
Matter of "Title Part" Special	Paper Co..... 342
Term, Sup. Ct., 2d Dept..... 901	Meeks v. Gravier..... 896
Matter of Toch..... 544	Meger, Gloss v..... 954
Matter of Van Denburgh..... 237	Meguvin v. Buehler..... 926
Matter of Van Riempet..... 475	Meissner v. Atlantic Hygienic
Matter of Voight..... 751	Ice Co..... 169
Matter of Wallstein..... 140	Melrose Fireproof Storage Ware-
Matter of Walsh..... 957	house Co., Goodman v..... 916
Matter of Waters..... 895	Merrick, Capello v..... 946
Matter of Wesley..... 957	Merriman v. Steele..... 909
Matter of Willett..... 957	Merritt, Matter of..... 911
Matter of Zerega Avenue..... 917	Metal Shelter Co., Inc., Mul-
Matthews Engineering Co.,	ronney v..... 914
Swift v..... 201	Metropolitan Life Ins. Co., Mon-
Maxwell v. Hoge..... 936	sell v..... 903
Maxwell-Briscoe Motor Co.,	Metropolitan Surety Co., People
Howard v..... 916	v..... 947
May v. Orange & Rockland	Metropolitan Trust Co., Brook-
Electric Co..... 903	lyn Bank v..... 225
Mayer v. Chamberlain..... 326	Metzler, Giesen v..... 858
McAuliff v. Palmer..... 891	Meyer v. United Dressed Beef
McAuliff v. United Fruit Co... 891	Co..... 902, 935
McCale v. New York State Rail-	Michel v. Walton Toy Co.... 907
ways..... 909	933, 935
McCullough v. Champion..... 943	Mickey, Hottenroth v..... 742
McCurdy & Norwell Co., Sickels	Mieduszewski v. Dexter Sulphite
Co. v..... 949	Pulp & Paper Co..... 949
McCusker, Matter of..... 896	Mikelionis (Milionis) v. Lehigh
McDermott v. Ingersoll & Bro. 943	& Wilkesbarre Coal Co..... 903
946	Milch, People v..... 875
McDonald v. State of New York. 943	Milionis (Mikelionis) v. Lehigh
McDowell, Matter of..... 243	& Wilkesbarre Coal Co..... 903
McGovern, Newman v..... 915	Milkman v. Casasa..... 902
McKay v. Hinchman Co..... 942	Miller v. Blumenthal & Co.,
McKee v. Standard Oil Co. of	Inc..... 919
New York..... 906	Miller v. Erie R. R. Co..... 949
McLaughlin & Co. v. Southern	Miller, Hyde Park Flint Bottle
Hotel Co..... 890	Co. v..... 897
McLoughlin v. City of New	Miller, People ex rel. Bull v.... 900
York..... 884	Miller, People ex rel. Central
McMahon v. Village of Water-	Hudson Steamboat Co. v.... 900
loo..... 945	Miller, People ex rel. Coldwell
McMullen v. Municipal Gas Co.	Lawn Mower Co. v..... 900
of City of Albany..... 943	Miller, People ex rel. Erie R. R.
McMullen Co., Waronen v.... 898	Co. v..... 900
McNab & Harlin Mfg. Co.,	Miller, People ex rel. Mailler
Verdicchio v..... 48	v..... 900

PAGE.	PAGE.
Miller, People ex rel. New York Central R. R. Co. v.	900
Miller, People ex rel. Pennsyl- vania Coal Co. v.	900
Miller, People ex rel. Ramsdell v. (Nos. 1 & 2)	900
Miller, Sennall v.	897
Miller, Wolfe v.	887
Millers National Ins. Co., Buse v. .	951
Miner v. Rembt.	173, 930
Mintz v. Dorfman.	921
Mirror Films, Inc., Carvill v. . .	644
Misses Masters School, People ex rel., v. Keys.	677
Mitchell v. Burroughs.	930
Mitchell v. Village of Danne- mora.	239
Mitchell, Matter of, v. Prender- gast.	690
Moebus, Matter of.	709
Moeckel, Gisnet v.	912
Moerlbach Sales Co., Clarke v. . .	891
Mohr v. Gillig.	934
Mongan, Clifford v.	941
Monsell v. Metropolitan Life Ins. Co.	903
Montegut v. Hickson, Inc.	94
Montgomery v. Shear.	892
Moore v. Pullen.	954
Moore Knitting Co., Reis & Co. v.	919
Moore & Tierney, Inc., Reis & Co. v.	919
Morgan, Killilea v.	924, 932
Morland Mortgage Co. v. Fisher. .	898
	915
Morris, Lewis v.	893
Morrow v. Globe-Wernicke Co. .	934
Morton Amusement Co., Inc., Bergen v.	400, 957
Mosier & Summers, Dampkow- ski v.	953
Moskowitz, Zuaro v.	936
Moss, People ex rel., v. Bd. of Supervisors of Oneida Co. . . .	716
Mott v. Martin.	914
Mott Wheel Works, People ex rel., v. Hayes.	301
Moubray v. G. & M. Improve- ment Co.	737
Mozambique Trading & Plan- tation Co., Hampel v.	918
Muldoon v. Seaver.	917
Mullen, Matter of.	957
Muller v. Wendt.	919
Muller & Son, Stauffenberg v. .	942
Mulroney v. Metal Shelter Co., Inc.	914
Municipal Gas Co. of City of Albany, McMullen v.	943
Murgittroyd v. Town of Lysander. .	949
Murphy v. Mackey.	889
Murphy v. Yonkers National Bank.	926
Murray, Hamilton v.	896
Murray v. Willenbrock.	890
Musicant v. Bradley Contract- ing Co. (2 cases)	914
N.	
Nappo, People v.	906
National Bank of Commerce, Prudential Ins. Co. v.	898
National Bank of Commerce of Rochester v. City of Water- vliet.	944
National Ben Franklin Ins. Co., Buse v.	951
National Casket Co., Ridley v. .	954
National Excavating & Founda- tion Co., Inc., Reddy v.	943
Naud v. King Sewing Machine Co.	31, 955
Naulty v. Gorham Mfg. Co. . . .	36
Neal, Clark & Neal Co. v. Liver- pool & London & Globe Ins. Co., Ltd.	730
Nellis v. Countryman.	947
Nelson, Smith v.	950
Netherlands-American Steam Navigation Co., Thornton v. . .	604
Neustadt v. Jamaica Estates. . .	902
New England Equitable Ins. Co., Bronnie v.	331
New England Equitable Ins. Co., Patterson v.	944

TABLE OF CASES REPORTED.

xxiii

PAGE.	PAGE.
New Jersey & New York R. R. Co., Secor v.....	New York, City of, McLoughlin v.....
906	884
New Rochelle, Bd. of Health of, v. Farrell.....	New York, City of, v. New York Steam Co.....
714	79
New York Central & H. R. R. R. Co., Higgs v.....	New York, City of, New York, Westchester & Boston R. Co. v.....
949	893
New York Central & H. R. R. R. Co., Kowalski v.....	New York, City of, O'Brien v....
953	920
New York Central & H. R. R. R. Co., Richmond v.....	New York, City of, O'Connor v.
952	550
New York Central & H. R. R. R. Co., Rieger v.....	New York, City of, Parker Co. v.....
954	918
New York Central & H. R. R. R. Co., Slaviz v.....	New York, City of, Planten v..
893	824
New York Central R. R. Co., Ames v.....	New York, City of, Rapson v..
324, 946	908
New York Central R. R. Co., Chew v.....	New York, City of, Schmidt v. (2 cases).....
950, 955	896
New York Central R. R. Co., People ex rel., v. Block... 251,	New York, City of, Schwalbach v.....
955	908
New York Central R. R. Co., People ex rel., v. Douglass... 956	New York, City of, Spearin v..
956	898
New York Central R. R. Co., People ex rel., v. Miller.....	New York, City of, Stern v....
900	916
New York, City of, Belfer v. (2 cases).....	New York, City of, Weber v....
925	893
New York, City of, Burns Bros. v.....	New York Consolidated R. R. Co., Wichman v.....
615	922
New York, City of, Carroll v....	New York Edison Co., Saks & Co. v.....
916	634
New York, City of, Carter v....	New York Life Ins. Co., Clare v.
907	877
New York, City of, Cleveland Trinidad Paving Co. v.....	New York Mills Corporation, Owens v.....
918	942, 946
New York, City of, Crittenton Co. v.....	New York, New Haven & H. R. R. Co., Fried v.....
824	309
New York, City of, Ellman v....	New York, Ontario & Western R. Co., Grosser v.....
920	956
New York, City of, Flaxman v..	New York Railways Co., Hessler v.....
935	921
New York, City of, Fougere & Co., Inc., v.....	New York Railways Co., Roddy v.....
824	896
New York, City of, Johnson v..	New York Railways Co., Strufe v.....
928	916
New York, City of, Kavanagh v.	New York, State of, Butterfield v.....
936	292
New York, City of, Lewis v....	New York, State of, Gatecomb v.
929	941
New York, City of, Magrath v..	New York, State of, Ingalls Stone Co. v.....
929	942
New York, City of, Matter of (Juniper Ave.). (2 cases)....	New York, State of, McDonald v.....
905	943
New York, City of, Matter of (Whitlock Ave.). (2 cases)..	New York, State of, Town of Glenville v.....
896	945
New York, City of, Matter of (Zerega Ave.).....	New York, State of, Waples Co. v.....
892	357

	PAGE.		PAGE.
New York State Railways, Benson v.....	956	Oltz, International Harvester Co. of America v.....	942
New York State Railways, McCale v.....	909	Onward Construction Co., People v.....	894
New York Steam Co., City of New York v.....	97	Orange & Rockland Electric Co., May v.....	903
New York Stockyards Co., People ex rel., v. Saxe.....	943	Oransky, Pictorial Review Co. v.....	921
New York Trust Co. v. Black..	4	Order of United Commercial Travelers of America, Ham-mill v.....	338
New York, Westchester & Boston R. Co. v. City of New York.....	893	Orient Ins. Co., Lynch v.....	953
Newfane, Town of, Langdon v..	909	Ormond, People ex rel. Crane v..	151
	957		922
Newman v. McGovern.....	915	Ormsby v. Hilltop Automobile Station, Inc.....	892
Nolan v. Fach.....	115	Osborne v. International R. Co.	950
Nolan v. Malley.....	913	Ostrander & Co., Inc., Esterson v.....	896
North Hempstead, Town of, Hoffman v.....	889	Ouderkirk, Strobel v.....	951
North Hempstead, Town of, Palma v.....	889	Outcault Advertising Co. v. Stratton.....	353
Northwestern National Ins. Co., Buse v.....	951	Overlander v. Holbrook, Cabot & Rollins Corporation.....	890
Norton v. Springfield, L. I., Cemetery Society.....	924	Owens v. New York Mills Corporation.....	942, 946
Nugent v. Rowland.....	454		
O.		P.	
O'Brien v. City of New York...	920	Palisade Realty & Amusement Co., Roscalzo v.....	892
O'Brien, Crombie v.....	807	Palisades Interstate Park, Comrs. of, Ramapo Mountains Water, Power & Service Co., Inc., v. (Nos. 1 & 2)....	924
O'Connor v. City of New York.	550	Palma v. Town of North Hempstead.....	889
O'Donnell, Blankenship v.....	957	Palmer, McAuliff v.....	891
O'Donnell, Matter of.....	928	Palmer v. Rotary Realty Co...	907
O'Hora v. Delaware, Lackawanna & Western R. R. Co..	956	Pardy v. Boomhower Grocery Co.....	347
O'Leary, Cronin v.....	909	Parker, Kaiser v.....	894
Obermeyer & Liebmann v. Kennedy.....	924	Parker, Steen v.....	950
Ocean Electric R. Co., Hecker v.....	933	Parker Co. v. City of New York.	918
Oesting Building Co., Bertrand v.....	905	Partridge, Gabel v.....	941
Ohlbaum v. Correa.....	838	Partridge, Lanphear v.....	910, 952
Okun v. Duval Co.....	913	Patterson v. New England Equitable Ins. Co.....	944
Olive, Zeeman v.....	919	Paulsen, Scully v.....	937
Oliver, Arnold v.....	907		
Olsen, Strout Farm Agency v..	953		
Olazewski v. Kolinski.....	924		

TABLE OF CASES REPORTED.

XXV

PAGE.	PAGE.
Pavia v. Petroleum Iron Works Co. of Pennsylvania..... 345	People v. Le Boy..... 930
Pavilion Natural Gas Co., People ex rel., v. Public Service Comm., Second Dist..... 937	People v. Livote..... 903
Pearsall v. Erie R. R. Co..... 908	People v. Luna Amusement Co. 797
Peart, Kittanning Face Brick Co., Inc., v..... 895	People v. Marco..... 915
Pelella, Matter of, v. Illinois Surety Co..... 920	People v. Maronna..... 899
Pelletier, People v..... 892	People v. Metropolitan Surety Co..... 947
Penn Realty Co., Carney v. 904, 925	People v. Milch..... 875
Penna Alcohol & Chemical Co. v. Robertson..... 916	People v. Nappo..... 906
Pennsylvania Coal Co., People ex rel., v. Miller..... 900	People v. Onward Construction Co..... 894
Pennsylvania R. R. Co., Clark v. 949	People v. Pelletier..... 892
Pennsylvania R. R. Co., Dahler v. 956	People v. Plaut..... 930
Pennsylvania R. R. Co., Pugh v..... 952, 957	People v. Pomeska..... 910
Pennsylvania R. R. Co., Ship- man v..... 910	People v. Richardson..... 925
People v. Altenkirch..... 903	People v. Rose..... 952
People v. Antonopoulos..... 894	People v. Sellaro..... 27
People v. Balsamo..... 899	People v. Simon..... 660
People v. Behan..... 930	People v. Simone..... 926
People v. Block..... 930	People v. Smith..... 894
People v. Bradford..... 371	People v. Stevens Co., Inc..... 306
People v. Breslin..... 891	People v. Sullivan..... 930
People v. Bull..... 916	People v. Sylvester..... 923
People v. Burns..... 845	People v. Tortora..... 914
People v. Carey..... 909	People v. Transit Development Co. (No. 1)..... 288
People v. Carvill..... 897	People v. Treichler..... 718
People, Edwards v..... 949	People v. Von Den Corput..... 907
People v. Flanagan..... 891	People v. Whitman..... 193
People v. Gardner..... 947	People v. Wilkes..... 918
People v. Giddings..... 956	People v. Witherbee..... 368
People v. Gleekman..... 882	People v. Wong..... 890
People v. Gregory..... 930	People v. Zabriskie..... 894
People v. Guipe..... 915	People v. Zuccaro..... 920
People v. Hale..... 926	People ex rel. Benger v. Davis. 944
People v. Hirsch..... 914	People ex rel. Bull v. Miller.... 900
People v. Hoffman..... 915	People ex rel. Central Hudson Steamboat Co. v. Miller.... 900
People v. Hoppe..... 930	People ex rel. Coldwell Lawn Mower Co. v. Miller..... 900
People v. Jamestown Electric Mills, Inc..... 950	People ex rel. Conklin v. Boyle. 908
People v. La Point..... 908	People ex rel. Crane v. Ormond. 151
People v. Lawson..... 224	People ex rel. Erie R. R. Co. v. Miller..... 900
	People ex rel. Gerry v. Woods. 902
	People ex rel. Jacobs v. Fethers- ton..... 934

PAGE.	PAGE.
People ex rel. Kings County Lighting Co. v. Straus... 840,	Philadelphia & Reading Coal & Iron Co., Bagdon v..... 662
People ex rel. Mailler v. Miller. 900	Philadelphia & Reading Coal & Iron Co., Brennan v..... 920
People ex rel. Misses Masters School v. Keys..... 677	Philadelphia & Reading Coal & Iron Co., Sacripante v..... 930
People ex rel. Moss v. Bd. of Supervisors of Oneida Co.... 716	Philadelphia & Reading Coal & Iron Co., Waisikoski v..... 932
People ex rel. Mott Wheel Works v. Hayes..... 301	Phillies, Matter of..... 911
People ex rel. New York Central R. R. Co. v. Block..... 251,	Phillips, Krause v..... 905
People ex rel. New York Central R. R. Co. v. Douglass..... 956	Phillips v. Sonn Brothers Co.... 896
People ex rel. New York Central R. R. Co. v. Miller..... 900	Phillips v. West Rockaway Land Co..... 905
People ex rel. New York Stock- yards Co. v. Saxe..... 943	Picaretto, Flaum v..... 952
People ex rel. Pavilion Natural Gas Co. v. Public Service Comm., Second Dist..... 937	Pictorial Review Co. v. Oransky. 921
People ex rel. Pennsylvania Coal Co. v. Miller..... 900	Pike, Matter of..... 897
People ex rel. Ramsdell v. Miller (Nos. 1 & 2)..... 900	Pitcher, Matter of..... 911
People ex rel. Rea, Matter of, v. Prendergast..... 930	Pittsburgh Plate Glass Co., Hur- ley v..... 927
People ex rel. Saranac Land & Timber Co. v. Extraordinary Sp. & Tr. Term, Supr. Ct... 910	Pixley, Walker v..... 956
People ex rel. Tappin v. Cropsey. 180	Planten v. City of New York... 824
People ex rel. Tuthill v. Howell. 904	Platt, People ex rel. Weeks v.. 935
People ex rel. Tyng v. Prender- gast..... 895	Plaut, People v..... 930
People ex rel. Weeks v. Platt.. 935	Pointon v. General Railway Signal Co..... 955
People ex rel. Westchester Light- ing Co. v. Fuchs..... 904	Polk, Whitehead v..... 922
People's Trust Co. v. Doolittle.. 802	Pollitzer v. Pollitzer..... 744,
Peoples Trust Co. v. Flynn..... 926	Pollock, Matter of..... 577
Perham v. Cottle..... 949	Polonaky, Berzin v..... 894
Perkins, Tierney v... 391, 945,	Pomeska, People v..... 910
Perry, Frantz Mfg. Co. v..... 941	Popular Pictures Corporation, Goldberg v..... 86
Persky, Wald v..... 916	Postal Life Ins. Co., Thompson v. 490
Petermann v. Steiner Sons & Co. 945	Postal Telegraph-Cable Co., Galschinski v..... 957
Petheram, Matter of..... 953	Pottberg, Doerfler v..... 899
Petrilli v. Atlanta Construction Co..... 952	Pratt v. City of Schenectady... 944
Petroleum Iron Works Co. of Pennsylvania, Pavia v..... 345	Prendergast, Mallett v..... 894
	Prendergast, Matter of Mitchell v..... 690
	Prendergast, Matter of People ex rel. Rea v..... 930
	Prendergast, People ex rel. Tyng v..... 895
	Price, Matter of Castle Heights Water Co. v..... 687
	Proctor Mt. Vernon Realty Co., Gurney Elevator Co. v..... 921

xxvii

Digitized by Google

PAGE.	PAGE.
Rochester, City of (In re Joiner St.)..... 911	Saranac Land & Timber Co., People ex rel., v. Extraordinary Sp. & Tr. Term, Supr. Ct. 910
Rochester Railway & Light Co. v. Speary..... 909	Saxe, People ex rel. New York Stockyards Co. v..... 943
Roddy v. New York Railways Co..... 896	Schaefer, Matter of..... 117
Rodgers & Hagerty, Inc., Ross v..... 904	Schaeffer v. De Lamar..... 904
Rogerson, Matter of..... 911	Schatz v. Hirschhorn..... 921
Ronsheim v. Knickerbocker Ice Co..... 897	Scheer v. Scheer Ginsberg Co. 892
Rooney, Matter of..... 896	Schenectady, City of, Pratt v.. 944
Roscalzo v. Palisade Realty & Amusement Co..... 892	Schenectady Railway Co., Swiderski v..... 944
Rose, People v..... 952	Schloffel, Madden v..... 894
Rose v. Town of Conklin... 944, 947	Schmidt v. City of New York. (2 cases)..... 896
Rosenberg v. Schweitzer..... 891	Schnaufer, Kendall v..... 917
Rosenfeld v. Seigel..... 944	School Site, Matter of (Jennings St.)..... 898
Rosengarten, Martin v. (2 cases)..... 934	Schoonover, Matter of..... 957
Rosinsky v. Wentka..... 953	Schoor, Kohut v..... 891
Ross v. Rodgers & Hagerty, Inc..... 904	Schreiner, Schweiger v..... 945
Rotary Realty Co., Palmer v.. 907	Schulder v. Ladew Co., Inc... 458
Rothschild (In re Lawyers Title & Trust Co.) v..... 919	Schwab v. Bradley Contracting Co..... 917
Rouse, Hamilton v..... 81	Schwalbach v. City of New York. 908
Rouyon, Matter of Thedford v. 928	Schwartz, Dalrymple v..... 921
Rowland, Nugent v..... 454	Schwartz, Jackson v..... 903
Rubel v. Honig..... 53	Schwartz v. Levin..... 914
Rubinstein v. Werbelovsky.... 917	Schwarz v. Alexander..... 641
Rushmore, Child v..... 920	Schweiger v. Schreiner..... 945
Russell, Timmons v..... 904	Schweitzer, Rosenberg v..... 891
Rutherford, Matter of..... 920	Scott, King v..... 903
S.	
Saccipante v. Philadelphia & Reading Coal & Iron Co.... 930	Scully v. Paulsen..... 937
Saint Joseph Lead Co., Holmes v. 914	Sea Beach R. Co., Lynett v... 112
Saks & Co. v. New York Edison Co..... 634	Seagle v. Barreto..... 925
Salmowitz, Doull Miller Co. v..... 916	Seaver, Muldoon v..... 917
Salzano v. Marine Ins. Co., Ltd. 948	Sebring, Matter of..... 953
Sanborn, Matter of. (2 cases). 896	Secor v. New Jersey & New York R. R. Co..... 906
Sandrowitz v. Strulowitz..... 891	Security Ins. Co., Martin v.... 949
Sanford v. Brady..... 939	Security Trust Co. of Rochester, Matter of..... 909
Santiago v. Southern Pacific Co. 894	Sees, Birch v..... 609
	Seibert, Tiffany Studios v..... 787
	Seigel, Rosenfeld v..... 944
	Sellaro, People v..... 27
	Sennall v. Miller..... 897
	Servace v. Flagler..... 918

TABLE OF CASES REPORTED.

xxix

	PAGE.		PAGE.
Sessions, Matter of.....	957	Snyder v. Macey.....	947
Seybel, Behrmann v.....	862	Snyder, Stein v.....	901
Sharlet v. Hanover Fire Ins. Co.	374	Solomon v. Kates.....	915
Shattle, Cook v.....	908	Sonn Brothers Co., Phillips v...	896
Shaw v. Ansaldi Co., Inc.....	589	Southard v. Jackson. (2 cases).	906
Shaw v. Davis.....	890	Southerland, Whaley v.....	945
Shear, Montgomery v.....	892	Southern Hotel Co., McLaughlin	
Sheehan v. Rapperport.....	950	& Co. v.....	890
Shelley, Kellner v.....	657	Southern Pacific Co., Santiago v.	894
Sherman, Ginsberg v.....	897	Spain v. Manhattan Shirt Co..	291
Sherwood v. Holbrook.....	462	Spearin v. City of New York..	898
Sherwood Shoe Co., Thompson		Speary, Rochester Railway &	
v.....	319	Light Co. v.....	909
Shiebler v. Smith.....	925	Spencer v. Williams.....	918
Shields v. Tunnicliff.....	949	Spiegel, Frankenberg v.....	890
Shipman v. Pennsylvania R. R.		Spiritusfabriek Astra of Amster-	
Co.....	910	dam, Holland, v. Sugar Prod-	
Sickels Co. v. McCurdy & Nor-		ucts Co.....	914
well Co.....	949	Springer, American Bill Posting	
Sickmon, Matter of.....	957	Co. v.....	889
Sieber v. Alphonsus.....	902	Springfield, L. I., Cemetery So-	
Sieskin v. Workmen's Circle....	897	cietv, Norton v.....	924
Silberstein, Wormser v.....	916	St. John v. Beskin.....	935
Silverstein v. Standard Accident		St. Joseph Society (Szwento Juc-	
Ins. Co.....	891	zupo Let Draugystes) v. Man-	
Simcoe v. Gamble.....	947	hattan Savings Institution....	57
Simers v. Kellogg.....	881	Staab, Goldsborough v.....	935
Simon, People v.....	660	Stafford, Inc., Bailey v.....	811
Simone, People v.....	926	Stahlberg v. Protected Home	
Singer v. Diaston & Sons, Inc..	108	Circle.....	948
Singer, Stein v.....	897	Stainton v. Matheson.....	926
Sinsheimer v. Underpinning &		Stamp v. Eighty-sixth Street	
Foundation Co.....	495	Amusement Co.....	893, 921
Sixth Avenue Realty Co. v.		Standard Accident Ins. Co.,	
Zeiler & Co. (2 cases).....	891	Silverstein v.....	891
Slaviz v. New York Central &		Standard Fire Ins. Co. of New	
H. R. R. R. Co.....	893	Jersey, Christgau v.....	948
Smith v. Brown Brothers Co....	952	Standard Oil Co. of New York,	
Smith, Corico v.....	33	McKee v.....	906
Smith v. Crear.....	902	Starke v. Catskill & Albany	
Smith v. Erie R. R. Co.....	931	Steamboat Co., Ltd.....	945
Smith, Matter of. (2 cases)....	911	Starr Piano Co., Glenalla Realty	
Smith v. Nelson.....	950	Corporation v.....	920
Smith, People v.....	894	State Board of Law Examiners,	
Smith, Shiebler v.....	925	Matter of.....	957
Smith v. Staten Island Land Co.	895	State of New York, Butterfield	
Smith v. Turner.....	931	v.....	292
Smith, Colon & Co. v.....	100	State of New York, Gatecomb v.	941

TABLE OF CASES REPORTED.

xxxi

PAGE.	PAGE.
Thompson v. Sherwood Shoe Co. 319	Towns Hospital, Robertson v. . 285
Thompson v. Thompson. 610	Traiche, Kurak v. 952
Thompson-Starrett Co. v. Federal-Huber Co. 914	Transit Development Co., People v. (No. 1) 288
Thorburn v. Gates. 916	Trapp v. International R. Co. . 954
Thorman v. United Merchants Realty & Improvement Co. . 892	Treichler, People v. 718
Thornton v. Netherlands-American Steam Navigation Co. . 604	Tull, de Moro v. 17
Thurn, Blaine v. 914	Tunnicliff, Shields v. 949
Tibbits v. Cohen. 680	Tupper Lake Chemical Co., Wood v. 942
Ticknor v. Landers. 945	Turner, Smith v. 931
Tidewater Paper Mills Co., Eriksen v. 903	Turner v. Turner. (2 cases) . 920
Tierney v. Perkins. . 391, 945, 947	Turrill v. Davenport. 935
Tiffany Studios v. Seibert. 787	Tuthill, People ex rel., v. Howell. 904
Tilton v. Brown. 915	Tyng, People ex rel., v. Prendergast. 895
Tilyou, Hervey v. 917	U.
Timmons v. Russell. 904	Uhr, Israel v. 891
Title Guarantee & Trust Co. v. Queens Land & Title Co. . 931	Underpinning & Foundation Co., Sinsheimer v. 495
"Title Part," Special Term, Supr. Ct., Second Dept., Matter of. 901	Union Pacific R. R. Co., Burke v. 783
Tooh, Matter of. 544	United Dressed Beef Co., Meyer v. 902, 935
Todd v. Interborough Rapid Transit Co. 893	United Fruit Co., McAuliff v. . 891
Toler, Carey v. 892	United Merchants Realty & Improvement Co., Thorman v. 892
Tolman v. American Museum of Safety. 920	United Paperboard Co., Lotbiniere Lumber Co. v. 942
Tortora, People v. 914	United Toilet Goods Co., Ash v. 890
Town of Bethlehem, Van Buren v. 254	Udpike, Stock v. 944
Town of Brookhaven (In re Hedges). 899	V.
Town of Brookhaven v. Robinson. 901, 924	Van Arsdale v. Erie R. R. Co. . 952
Town of Conklin, Rose v. . 944, 947	Van Buren v. Town of Bethlehem. 254
Town of Glenville v. State of New York. 945	Van Denburgh, Matter of. 237
Town of Lysander, Murgittroyd v. 949	Van Horn v. Van Horn. 891
Town of Newfane, Langdon v. 909, 957	Van Riempest, Matter of. 475
Town of North Hempstead, Hoffman v. 889	Van Valkenburgh v. Bishop. . 937
Town of North Hempstead, Palma v. 890	Van Wagenen v. Fisher. 898
	Vacuum Oil Co., Amesbury v. . 945
	Vance v. Frazee & Co., Inc. . 947
	Verdicchio v. McNab & Harlin Mfg. Co. 48
	Vetault v. Kennedy. 228
	Vidinghoff v. Symington Co. . 910

	PAGE.		PAGE.
Village of Dannemora, Mitchell v.	239	Wendt, Muller v.	919
Village of Waterloo, McMahon v.	945	Wentka, Rosinsky v.	953
Voelker v. Buffalo Steam Pump Co.	954	Wenz v. Franciscan Fathers of the Church of the Assumption.	949, 955
Vogt, Frank v.	833	Werbelovsky, Rubinstein v.	917
Voight, Matter of.	751	Wesley, Kellner v.	657
Von Den Corput, People v.	907	Wesley, Matter of.	957
W.		West Eleventh Street (In re Jones).	654
Wagener v. Fisher.	915	West Rockaway Land Co., Phillips v.	905
Waisikoski v. Philadelphia & Reading Coal & Iron Co.	932	Westchester Lighting Co., People ex rel., v. Fuhs.	904
Waite, Kidney v.	260	Whaley v. Southerland.	945
Wakschal v. Wasser.	897	White v. Loades.	236
Wald v. Persky.	916	White, Warne v.	897
Walker v. Pixley.	956	Whitehead v. Polk.	922
Wallstein, Matter of.	140	Whitlock Avenue (In re City of New York). (2 cases).	896
Walsh, Matter of.	957	Whitman, People v.	193
Walter v. Knickerbocker.	954	Whyte's, Inc., Bendelari v.	921
Walton Toy Co., Michel v.	907, 933, 935	Wichman v. New York Consolidated R. R. Co.	922
Waples Co. v. State of New York.	357	Wilkes, People v.	918
Ward, Kerr v.	893	Willenbrock, Murray v.	890
Wardell, Auburn Draying Co. v.	270	Willet v. Beard.	951
Warne v. White.	897	Willet, Matter of.	957
Warner, Kohn v.	921	Williams, Spencer v.	918
Waronen v. McMullen Co.	898	Wilson, Blitz v.	901
Warren, Groves v.	333	Wilson, Brown v.	902
Washburn, Kelly v.	664	Wilson v. Long Island R. R. Co.	799
Wasser, Wakschal v.	897	Windram v. Brooklyn Daily Eagle.	890
Waterbury Wallace Co. v. Ivey.	891	Winters v. Marcotte & Co.	943
Waterloo, Village of, McMahon v.	945	Witherbee, People v.	368
Waters, Matter of.	895	Wittermann Brothers v. Forman Bottling Co.	674
Watertown, City of, Judge v.	909	Wittman v. Durolothic Co.	909, 951
Watervliet, City of, Leary v.	938	Wolf, Cooper Co. v.	933
Watervliet, City of, National Bank of Commerce of Rochester v.	944	Wolfe v. Miller.	887
Weber v. City of New York.	893	Wolff v. Lanternier.	892
Weber-Peuthert Co. v. Leventhal.	952	Wolffsohn v. Goldsmith & Co., Inc. (2 cases).	920
Weeker v. Hand.	889	Wong, People v.	890
Weeks, People ex rel., v. Platt.	935	Wood, La Fleur v.	397
Weinhandler v. Loewenthal.	890	Wood v. Tupper Lake Chemical Co.	942
Weir v. Holland.	937		

TABLE OF CASES REPORTED.

xxxiii

	PAGE.	Z.	PAGE.
Wood & Brooks Co. v. Davis		Zabriskie, People v.....	894
Mfg. Co.....	947	Zeeman v. Olive.....	919
Woods, People ex rel. Gerry v..	902	Zeiler & Co., Sixth Avenue	
Woody v. Brush.....	698	Realty Co. v. (2 cases).....	891
Workmen's Circle, Sieskin v....	897	Zerega Avenue (In re City of	
Wormser v. Silberstein.....	916	New York).....	892
Wulp v. Coney Island & Graves-		Zerega Avenue, Matter of.....	917
end R. Co.....	902	Zimit, Bruh v.....	921
Wysiecki, Hegstad v.....	733	Zimit v. Chaitman.....	906, 927
		Zitelli, Curry v.....	925
Y.		Zuaro v. Moskowitz.....	936
Yamin v. Harris Raincoat Co...	945	Zuccaro, People v.....	920
Yawger, Keppenberg v.....	947	Zuck, Eastman Machine Co,	
Yonkers National Bank, Murphy		v.....	951, 957
v.....	926	Zweig v. Glasser.....	927

APP. DIV.—VOL. CLXXVIII. iii

TABLE OF CASES CITED.

	A.	PAGE.
Ackerman v. Ackerman.....	200 N. Y. 72, 76.....	745
Ackley v. Board of Education.....	174 App. Div. 44.....	682
Adam v. Manhattan Life Ins. Co....	204 N. Y. 357.....	494
Adams v. Anderson.....	23 Misc. Rep. 705.....	266
Agne v. Schwab.....	123 App. Div. 746.....	69
Albany City Savings Inst. v. Burdick.	87 N. Y. 40.....	355
Alger v. Miller.....	56 Barb. 227.....	238
Allen v. Tarrant & Co.....	7 App. Div. 172.....	61
Amberg v. Kinley.....	214 N. Y. 531.....	809
American Pipe & Construction Co. v. Westchester County.....	225 Fed. Rep. 947, 952.....	886
Amernan v. Deane.....	132 N. Y. 361.....	500
Amory v. Delamirie.....	1 Str. 505.....	653
Amaden v. Manchester.....	40 Barb. 158.....	676
Anderson v. Read.....	106 N. Y. 333, 344.....	335
Anderton v. Wolf.....	41 Hun, 571.....	723
Angrave v. Stone.....	45 Barb. 35.....	676
Appleby v. Erie County Savings Bank.....	62 N. Y. 12.....	59
Assets Collecting Co. v. Equitable Trust Co.....	168 App. Div. 145.....	670
Atlantic Coast Line Railroad v. Burnette.....	239 U. S. 199.....	35
Atlantic Coast Line R. R. Co. v. Mims.....	242 U. S. 532.....	35
Attorney-General ex rel. Haight v. Love.....	39 N. J. L. 476.....	692
Avon Springs Sanitarium Co. v. Weed.....	119 App. Div. 566; revd., 189 N. Y. 557.....	597
B.		
Backhouse v. Bonomi.....	9 H. L. C. (Clark) 503.....	406
Bacon v. United States Mutual Accident Assn.....	123 N. Y. 304.....	352
Baldwin v. Abraham.....	57 App. Div. 67, 73; 171 N. Y. 677.....	708
Baldwin v. Short.....	125 N. Y. 553.....	676
Baltimore & Ohio, etc., Railway v. Voigt.....	176 U. S. 498.....	686
Bank of Batavia v. N. Y., L. E. & W. R. R. Co.....	106 N. Y. 195.....	519

Bank of British North America v. Merchants' Nat. Bank of N. Y....	91 N. Y. 106.....	60
Bank of North America v. Penn Motor Car Co.	31 Am. Bank. Rep. 395.....	67
Barber v. Ellingwood, No. 2.....	137 App. Div. 704, 713.....	234
Barbour v. De Forest.....	95 N. Y. 13.....	775
Barnes v. Midland R. R. Terminal Co.....	193 N. Y. 378, 383.....	619, 625
Barnett v. Sussman.....	116 App. Div. 859.....	461
Barnett v. Vaughan Institute.....	119 N. Y. Supp. 45; <i>affd.</i> , 134 App. Div. 921; <i>affd.</i> , 197 N. Y. 541.....	428, 430
Barrett v. State of New York.....	220 N. Y. 423.....	516
Barrow Steamship Co. v. Kane.....	170 U. S. 100.....	663
Barrus v. Phaneuf.....	166 Mass. 123.....	610
Barson v. Mulligan.....	191 N. Y. 306, 322.....	820, 822
Barton v. Griffin.....	36 App. Div. 572.....	484, 486, 489
Bates v. Holbrook.....	171 N. Y. 460, 469, 471....	502, 503
Bates v. Rosekrans.....	37 N. Y. 409.....	488
Bauer v. Amba.....	144 App. Div. 274.....	956
Bauman v. Ross.....	167 U. S. 577-588.....	656
Baumert v. Malkin.....	178 App. Div. 913.....	428
Baxter v. McDonnell.....	154 N. Y. 432, 436.....	32, 35
Bell Telephone Co. v. Parker.....	187 N. Y. 299.....	793
Beman v. Todd.....	124 N. Y. 114.....	676
Bennett v. Buchan.....	76 N. Y. 386.....	513
Benton v. Trustees of Boston City Hospital.....	140 Mass. 13.....	683
Berg v. Parsons.....	156 N. Y. 109.....	104, 409
Bernheimer v. Herrman.....	44 Hun, 110.....	61
Besson v. Eveland.....	26 N. J. Eq. 468.....	736
Betts v. City of Williamsburgh.....	15 Barb. 255.....	657
Biggs v. Sea Gate Assn.....	211 N. Y. 482.....	740
Bingham v. Gaynor.....	203 N. Y. 27, 31.....	703
Birdsall v. Cary.....	66 How. Pr. 358.....	657
Bischoff v. Yorkville Bank.....	218 N. Y. 106.....	607
Blackman v. Striker.....	142 N. Y. 555.....	426
Blake v. Ferris.....	5 N. Y. 48.....	409
Blood v. Kane.....	130 N. Y. 514, 517.....	247
Bloodgood v. Lewis.....	146 App. Div. 86; 209 N. Y. 95.	776
Board of Water Comrs. of Cohoes v. Lansing.....	45 N. Y. 19.....	539
Bohm v. Met. Elev. R. Co.....	129 N. Y. 576, 586, 587....	596, 657
Boisnot v. Wilson.....	95 App. Div. 489.....	697
Bostwick v. Menck.....	40 N. Y. 383.....	70
Bosworth v. Allen.....	168 N. Y. 157, 165.....	179
Bowden v. Lehigh Valley R. R. Co..	173 App. Div. 918.....	414
Boyd v. United States.....	116 U. S. 616, 630.....	850

TABLE OF CASES CITED.

xxxvii

	PAGE.
Bradhurst v. Field.....	135 N. Y. 564..... 479
Bradley v. Degnon Contracting Co..	157 App. Div. 237..... 506
Bradley v. Wheeler.....	44 N. Y. 495, 501..... 336
Bradley & Son v. Huber Co.....	146 App. Div. 630; affd., 210 N. Y. 627..... 918
Brady v. Reynolds.....	13 Cal. 31..... 227
Brashear v. Rabenstein.....	71 Kans. 455..... 684
Brauer v. Lawrence.....	165 App. Div. 8..... 956
Brauer v. Oceanic Steam Navigation Co.....	178 N. Y. 339..... 259
Brehm v. Mayor, etc.....	104 N. Y. 186..... 656
Brewster v. Silence.....	8 N. Y. 207, 214..... 228
Brewster v. Silverstein.....	78 Misc. Rep. 123..... 835
Briggs v. Bergen.....	23 N. Y. 162..... 484, 485
Brink v. Home Ins. Co.....	2 App. Div. 122..... 670
Brinkerhoff v. Brown.....	6 Johns. Ch. 139..... 466
Broadway Trust Co. v. Manheim....	47 Misc. Rep. 415..... 68
Bronnie v. New England Equitable Ins. Co.....	178 App. Div. 331..... 944
Brounstein v. Sahlein.....	65 Hun, 365..... 954
Brown v. Bowe.....	35 Hun, 488..... 482
Brown v. Curtiss.....	2 N. Y. 225..... 228
Brown v. Quintard.....	177 N. Y. 75..... 478
Brusso v. City of Buffalo.....	90 N. Y. 679..... 929
Bryan v. McGurk.....	200 N. Y. 332..... 749, 750
Buchanan v. Foster.....	23 App. Div. 542..... 164
Buckley v. Stansfield.....	155 App. Div. 735; affd., 214 N. Y. 679..... 601
Budd v. Atkinson.....	30 N. J. Eq. 530..... 736
Burchell v. Burchell.....	96 Misc. Rep. 600..... 924
Burhans v. Sanford.....	19 Wend. 417..... 954
Burrow v. Marceau.....	124 App. Div. 665..... 95
Burstein v. People's Trust Co.....	143 App. Div. 165..... 60
Burstein v. Sullivan.....	134 App. Div. 623..... 60, 61
Burton v. Burton.....	150 App. Div. 790..... 436
Buttlar v. Buttlar.....	57 N. J. Eq. 645..... 611

C.

Caesar v. Bernard.....	156 App. Div. 724, 732; affd., 209 N. Y. 570..... 464, 465, 598
Callahan v. O'Rourke.....	17 App. Div. 277..... 956
Cameron-Hawn Realty Co. v. City of Albany.....	207 N. Y. 377, 381..... 729, 857
Caponigri v. Altieri.....	165 N. Y. 255..... 502
Carr v. Kimball.....	153 App. Div. 825; affd., 215 N. Y. 634..... 596
Carrington v. Crocker.....	37 N. Y. 336..... 648
Carvill v. Mirror Films, Inc.....	98 Misc. Rep. 650..... 646

	PAGE.
Catlin v. Adirondack Co.	11 Abb. N. C. 377..... 235
Central Union Gas Co. v. Browning.	210 N. Y. 10..... 469
Chambers v. Chambers.	61 App. Div. 299, 308..... 446
Chambers v. Lancaster.....	160 N. Y. 348..... 649
Chambers v. Vassar's Sons & Co., Inc.	81 Misc. Rep. 562..... 108
Champlin v. Baldwin.....	1 Paige, 562..... 266
Chapin v. Dobson.....	78 N. Y. 74..... 474
Chapin v. Pease.....	10 Conn. 69..... 736
Chase v. Deering.....	104 App. Div. 192..... 650
Chaurant v. Maillard.....	56 App. Div. 11..... 696
Cheney v. Scharmann.....	145 App. Div. 456, 470..... 540
Chester v. Kingston Bank.....	17 Barb. 271; 16 N. Y. 336... 927
Chicago Union Traction Co. v. Jerka.	227 Ill. 95..... 114
Chichester v. Winton Motor Car- riage Co.	110 App. Div. 78, 80..... 199
Chipley v. Atkinson.....	23 Fla. 206..... 704
Church v. Brown.....	21 N. Y. 315, 323..... 228
Churchill v. Lewis.....	17 Abb. N. C. 226..... 164
City of Buffalo v. Stevenson.....	145 App. Div. 117..... 715
Clare v. N. Y. Life Ins. Co.....	100 Misc. Rep. 308..... 879
Clark v. Devoe.....	124 N. Y. 120..... 426
Clark v. West.....	193 N. Y. 349, 360..... 462
Clarkson v. Clarkson.....	18 Barb. 646..... 125
Cochrane v. Schell.....	140 N. Y. 516..... 774
Coit v. Stewart.....	50 N. Y. 17..... 456
Cole v. M. I. Co.....	133 N. Y. 164..... 466
Coleman v. Bartholomew.....	175 App. Div. 122..... 344
Collard v. Beach.....	81 App. Div. 582..... 663
Collins v. Collins.....	80 N. Y. 1..... 823
Colon v. Lisk.....	153 N. Y. 188, 197..... 829
Conrady v. Buhre.....	148 App. Div. 776..... 696
Conroy v. Oregon Const. Co.....	23 Fed. Rep. 71, 73..... 694
Consolidated Ice Co. v. Mayor, etc..	166 N. Y. 92, 100, 101..... 618
	623, 624, 629
Consolidated Rubber Tire Co. v. Vehicle Equipment Co.....	121 App. Div. 764..... 68
Cook v. Lowry.....	95 N. Y. 103..... 777
Cook v. Stockwell.....	206 N. Y. 481..... 134
Cooper v. Heatherton.....	65 App. Div. 561..... 756
Coppola v. Kraushaar.....	102 App. Div. 306..... 457
Corbett v. St. Vincent's Industrial School.....	79 App. Div. 343-348; <i>affd.</i> , 177 N. Y. 16..... 682, 683
Cottriss v. Village of Medina.....	139 App. Div. 872..... 293
Cottone v. Murray's.....	138 App. Div. 874..... 646
Crawford v. Burke.....	195 U. S. 176..... 471

TABLE OF CASES CITED.

xxxix

PAGE.

Crocker-Wheeler Co. v. Genesee Recreation Co.....	160 App. Div. 373.....	469
Cromwell v. Benjamin.....	41 Barb. 558.....	238
Cruger v. Union Trust Co.....	173 App. Div. 797, 803, 804....	793
Cullen v. Friedland.....	152 App. Div. 124.....	466, 601
Cumberland Glass Co. v. De Witt...	237 U. S. 447.....	68
Curnan v. D. & O. R. R. Co.....	138 N. Y. 480.....	361
Curran v. Galen.....	152 N. Y. 33.....	276, 277, 280
Curran v. Oppenheimer.....	164 App. Div. 746....	596, 597, 599
Curtis v. Natalie Anthracite Coal Co.	89 App. Div. 61, 71; affd., 181 N. Y. 543.....	534

D.

Dale v. City of Syracuse.....	71 Hun, 449.....	929
Dale v. Hual Const. Co.....	175 App. Div. 284.....	942
Daley v. Hellman.....	16 N. Y. Supp. 689.....	670
Dalton v. Angus.....	6 App. Cas. 740, 742, 746, 792, 808, 829.....	406, 408
Daly v. Haight.....	170 App. Div. 469.....	925, 927
Daniell v. Shaw.....	166 Mass. 582.....	516
Dannat v. Mayor.....	66 N. Y. 585.....	886
Darcy v. Brooklyn & N. Y. Ferry Co.	196 N. Y. 99.....	466, 601
Davidsburgh v. Knickerbocker Life Ins. Co.....	90 N. Y. 526, 529, 530.....	365
Davidson v. Ream.....	97 Misc. Rep. 89, 102, 103, 118, 119.....	364, 366
Davidson v. Village of White Plains..	197 N. Y. 266.....	886
Davies v. Harvey Steel Co.....	6 App. Div. 166.....	534
Davis v. Bliss.....	187 N. Y. 77.....	469
Davis v. Davis.....	75 N. Y. 221.....	957
Davis v. Dodge.....	126 App. Div. 469.....	646
Davis v. Graves.....	29 Barb. 480.....	735
Davison v. Farr, Ward & Co.....	18 Misc. Rep. 124.....	456
De Graaf v. Wyckoff.....	118 N. Y. 1.....	488
Deeves & Son v. Manhattan Life Ins. Co.....	195 N. Y. 324.....	461
Delcambre v. Delcambre.....	210 N. Y. 465.....	655
Deming v. Terminal Railway of Buffalo.....	169 N. Y. 1.....	409
Denny v. Denny.....	123 Ind. 240.....	818
Devendorf v. Wert.....	42 Barb. 228.....	457
Dexter v. Harvard College.....	176 Mass. 192.....	679
Dickerson v. Sheehy.....	156 App. Div. 101; affd., 209 N. Y. 592.....	672
Dickinson v. Tyssen.....	125 App. Div. 735, 737.....	646 649, 650
Dieterlen v. Miller.....	114 App. Div. 40.....	740
Dill & Collins Co. v. Morison.....	159 App. Div. 583.....	534

	PAGE.
Dinenny v. Reavis.....	100 Misc. Rep. 316..... 923
Dobbs v. Prudden-Winslow Co.....	95 Misc. Rep. 250..... 835
Doerfler v. Pottberg.....	170 App. Div. 578; 218 N. Y. 27; 177 App. Div. 927..... 809
Dolin v. Leonard.....	144 Ind. 410..... 266
Donahue v. Keystone Gas Co.....	181 N. Y. 313..... 505
Dooley v. Pease.....	180 U. S. 126..... 470
Dorrity v. Rapp.....	72 N. Y. 307, 312..... 408
Dougherty v. Deeney.....	41 Iowa, 19, 21..... 818
Dubuc v. Lazell, Dalley & Co.....	182 N. Y. 482, 486..... 199
Duncan v. Spear.....	11 Wend. 54..... 482
Duncomb v. N. Y., H. & N. R. R. Co.	84 N. Y. 190..... 931
Dunn v. Whalen.....	21 N. Y. Supp. 809..... 735
Dusenbury v. Hoyt.....	53 N. Y. 521..... 736
Dyker Meadow L. & I. Co. v. Cook.	159 N. Y. 7..... 516

E.

Eames Vacuum Brake Co. v. Prosser.	157 N. Y. 289..... 834
Earle v. Earle.....	147 App. Div. 930..... 823
Eokes v. Stetler.....	98 App. Div. 76..... 684
Eidt v. Eidt.....	203 N. Y. 325..... 477
Eldridge v. City of Binghamton....	120 N. Y. 313..... 656
Empire State Type Founding Co. v. Grant.....	114 N. Y. 40, 44..... 335, 336
Employers' Liability Cases.....	207 U. S. 463..... 831
Entick v. Carrington.....	19 Howell's State Trials, 1029. 849
Esty v. Clark.....	101 Mass. 36, 39..... 394
Ettlinger v. Persian Rug & Carpet Co.....	142 N. Y. 189..... 880
Evanston v. Gunn.....	99 U. S. 660..... 539

F.

Falk v. Starr.....	31 Misc. Rep. 756..... 61
Farrigan v. Pevear.....	193 Mass. 147..... 683
Fennikoh v. Gunn.....	59 App. Div. 132..... 337
Fettretch v. McKay.....	47 N. Y. 426..... 484
Fidelity & Deposit Co. v. City of New York.....	108 App. Div. 263..... 886
Fitzwater v. Warren.....	206 N. Y. 358..... 686
Flagg v. United States.....	233 Fed. Rep. 481..... 851
Flansburg v. Town of Elbridge.....	205 N. Y. 423..... 256
Fleming v. Peterson.....	167 Ill. 465..... 611
Fletcher v. McKeon.....	71 App. Div. 278..... 643, 644
Foot v. Stiles.....	57 N. Y. 399..... 694
Forbell v. City of New York.....	164 N. Y. 522..... 689
Ford v. Chase.....	118 App. Div. 605; aff'd., 189 N. Y. 504..... 597

TABLE OF CASES CITED.

xli

	PAGE.
Forman v. Whitney	2 Abb. Ct. App. Dec. 163.... 936
Foster v. Persch	68 N. Y. 400..... 230
Fougeray v. Cord	50 N. J. Eq. 185..... 180
Fourth National Bank v. Noonan ..	14 Mo. App. 243, 247; 88 Mo. 372, 376..... 648
Franklin v. Kidd	219 N. Y. 409..... 449
French v. Carhart	1 N. Y. 96..... 356
Fried v. New York, New Haven & H. R. R. Co	176 App. Div. 936..... 311
Fries v. New York & Harlem R. R. Co	169 N. Y. 282..... 503
Fritz v. Worden	20 App. Div. 241..... 736
Froelich v. City of New York	199 N. Y. 466..... 409, 410
Frohman Amusement Corporation v. Blinkhorn	175 App. Div. 926..... 432
Froomkin v. Brooklyn Daily Eagle Co	113 App. Div. 443..... 654
Fullerton v. Jackson	5 Johns. Ch. 278..... 8

G.

Gaffney v. City of New York	218 N. Y. 225..... 241, 298
Gaines v. Relf	12 How. (U. S.) 472, 570.... 539
Gallagher v. Crooks	132 N. Y. 338, 343..... 394
Gallon v. Hussar	172 App. Div. 393..... 430
Garno v. Burgard	171 App. Div. 972..... 303
Gasquet v. Pollock	1 App. Div. 512, 513; <i>affd.</i> , 158 N. Y. 734..... 6, 7, 10
Gates v. De La Mare	142 N. Y. 312..... 655, 656
Gee v. Pendas	66 App. Div. 566..... 696
Geiger v. Gotham Can Co	177 App. Div. 29..... 320
Geiser v. St. Louis, I. M. & S. R. Co.	61 Mo. App. 459..... 114
General Supply & Construction Co. v. Goelet	149 App. Div. 80..... 461
Genet v. City of Brooklyn	99 N. Y. 296..... 657
German American Coffee Co. v. Diehl, No. 2	86 Misc. Rep. 547; <i>affd.</i> , 168 App. Div. 913..... 466
Gill Engraving Co. v. Doerr	214 Fed. Rep. 111..... 275, 276
Gillespie v. Montgomery	93 App. Div. 403..... 696
Glenn v. Garth	133 N. Y. 18, 44..... 542
Goodhue v. Pennell	164 App. Div. 821..... 429
Goodrich v. Pratt	114 App. Div. 771..... 740
Goodwin v. Coddington	154 N. Y. 283..... 673
Gotthelf v. Stranahan	138 N. Y. 345..... 514
Gould v. Olympic Mining Co	49 Misc. Rep. 612..... 660
Grandin v. Hernandez	29 Hun, 399, 402..... 356
Granger v. City of Syracuse	38 How. Pr. 308..... 657

		PAGE.
Greenwald v. Barrett.....	199 N. Y. 170.....	784
Greve v. Aetna Live Stock Ins. Co..	81 Hun, 28.....	199
Groh's Sons v. Groh.....	80 App. Div. 85.....	180, 596
Grosser v. City of Rochester.....	148 N. Y. 235.....	712
Gugel v. Hiscox.....	178 App. Div. 907.....	901
Guild v. Butler.....	127 Mass. 386, 390.....	927
Gursky v. Blair.....	218 N. Y. 41.....	204

H.

Hadacheck v. Los Angeles.....	239 U. S. 394.....	516, 829
Hagner v. Hall.....	10 App. Div. 581; <i>affd.</i> , 159 N. Y. 552.....	749
Hanrahan v. Cochran.....	12 App. Div. 91.....	941
Harrington v. City of Buffalo.....	121 N. Y. 147, 150.....	242, 298
Hart v. Pennsylvania R. R. Co.....	112 U. S. 331.....	784
Hartell v. Simonson & Son Co.....	218 N. Y. 345.....	942
Hartley v. Pioneer Iron Works.....	181 N. Y. 73.....	596
Harvey Co. v. National Drug Co....	75 App. Div. 103.....	828
Hastorf v. Kelly.....	9 Daly, 403, 405.....	668
Hatch v. Heinze.....	172 App. Div. 675.....	466
Hauser v. North British & Mercan- tile Ins. Co.....	152 App. Div. 91; <i>affd.</i> , 206 N. Y. 455.....	831
Havana Central R. R. Co. v. Knick- erbocker Trust Co.....	198 N. Y. 422, 427.....	60, 607
Hayden v. Pierce.....	144 N. Y. 512, 516.....	553
Hazard v. Wight.....	201 N. Y. 399, 402.....	602
Health Department v. Rector, etc....	145 N. Y. 32, 39.....	830
Heller v. Cohen.....	154 N. Y. 306.....	516
Hentz v. National City Bank.....	159 App. Div. 743.....	60
Herbert v. Duryea.....	34 App. Div. 478; <i>affd.</i> , 164 N. Y. 595.....	597
Herrmann v. Cabinet Land Co.....	217 N. Y. 526, 529.....	821
Hiles v. Fisher.....	144 N. Y. 306.....	712
Hill v. Guaranty Trust Co.....	163 App. Div. 374.....	775, 777
Hirshkind v. Mayer.....	91 App. Div. 416.....	670
Hiscock v. Lacy.....	9 Misc. Rep. 578.....	180
Hoffman v. Murray.....	N. Y. L. J. March 27, 1913; <i>affd.</i> , 159 App. Div. 904; 216 N. Y. 750.....	20
Hoffman House v. Foote.....	172 N. Y. 350.....	684
Hogan v. Hospital Co.....	63 W. Va. 84.....	287, 288
Holden v. Burnham.....	2 Hun, 678.....	736
Holliday v. St. Leonard's.....	11 C. B. (N. S.) 192.....	683
Hone v. Van Schaick.....	3 Barb. Ch. 488, 508, 509.....	756
Hopkins v. Davis.....	23 App. Div. 235.....	469
Hordern v. Salvation Army.....	199 N. Y. 233.....	683

TABLE OF CASES CITED.

xliii

	PAGE.
Horton v. Parsons.....	37 Hun, 45..... 694
Howard v. Daly.....	61 N. Y. 362..... 650
Hoyer v. Village of North Tona- wanda.....	79 Hun, 39..... 929
Hubbard v. Rodger.....	75 Hun, 220..... 333
Hughes v. Percival.....	8 App. Cas. 443, 445..... 408
Humphrey v. Tatman.....	198 U. S. 91..... 470
Hunt v. Heath.....	178 App. Div. 934..... 934
Hunter v. City of New York.....	151 App. Div. 30..... 793
Hunter, Inc., v. N. Y., N. H. & H. R. R. Co.....	97 Misc. Rep. 26..... 800
Hurley v. Brown.....	44 App. Div. 480..... 427
Hyatt v. Allen.....	56 N. Y. 553, 557..... 128, 131

I.

Indianapolis & Northwestern Traction Co. v. Henderson.....	39 Ind. App. 324..... 114
International Harvester v. Kentucky.....	234 U. S. 579..... 202

J.

Jackson v. Volkening.....	81 App. Div. 36; affd., 178 N. Y. 562..... 835
Jacobson v. Brooklyn Lumber Co. . .	184 N. Y. 152, 161..... 723
Jacobson v. Jacobson.....	170 App. Div. 966; appeal dis- missed, 216 N. Y. 707.... 561-563
Jacobus v. Jamestown Mantel Co. .	211 N. Y. 154..... 533
James v. Bowman.....	190 U. S. 127..... 831
Jarmulowsky v. Rosenbloom.....	125 App. Div. 542..... 643
Jarvis v. Babcock.....	5 Barb. 139..... 8
Jeffery v. Selwyn.....	220 N. Y. 77..... 597
Jenkins v. Freyer.....	4 Paige, 47, 53..... 756
Joel v. Woman's Hospital.....	89 Hun, 73..... 683
Johnson v. Lawrence.....	95 N. Y. 154, 159..... 246
Johnston v. Fargo.....	184 N. Y. 379..... 686
Johnston v. Trask.....	116 N. Y. 136..... 138, 139
Junkermann v. Tilyou Realty Co. . .	213 N. Y. 404, 408..... 666

K.

Kamman v. Kamman, No. 1.....	167 App. Div. 423..... 957
Kamp v. Kamp.....	59 N. Y. 212, 216-218.... 363, 364
Kane v. N. Y. Elev. R. R. Co.....	125 N. Y. 164, 180..... 505
Kane v. Odell.....	N. Y. L. J. March 13, 1916.... 756
Kearny v. Metropolitan Trust Co. . .	110 App. Div. 236..... 60, 61
Keene v. Wheatley.....	14 Fed. Cas. 180, 199..... 848
Kelley v. Buffalo Savings Bank.....	180 N. Y. 171..... 59
Kellogg v. Sowerby.....	190 N. Y. 370..... 279

Kelly v. St. Michael's Roman Catholic Church.....	148 App. Div. 767.....	461
Keltenbaugh v. St. Louis, A. & T. R. Co.....	34 Mo. App. 147.....	114
Kenderdine Hydro-Carbon Fuel Co. v. Plumb.....	182 Penn. St. 463, 469.....	815
Kennedy v. Porter.....	109 N. Y. 526, 549.....	729
Kenney v. Apgar.....	93 N. Y. 539, 549.....	106, 108
Kerker v. Levy.....	206 N. Y. 109.....	676
Kern v. Brooklyn Heights R. R. Co.	177 App. Div. 929.....	907
Kerr v. Quincy, etc., R. R. Co.....	113 Mo. App. 1.....	114
Kiernan v. Dutchess County Mut. Ins. Co.....	150 N. Y. 190, 194, 195.....	462
King v. Barnes.....	109 N. Y. 267, 285.....	729
King v. King.....	73 App. Div. 547.....	649
King v. Village of Fort Ann.....	180 N. Y. 496.....	256
Kingsland v. Mayor, etc.....	110 N. Y. 569.....	689
Kinney v. Watts.....	14 Wend. 38.....	22
Kip v. Kip.....	33 N. J. Eq. 213.....	712
Kirsch v. Tozier.....	143 N. Y. 390, 395.....	869
Kitching v. Brown.....	180 N. Y. 414, 427.....	426, 740
Klinefelter v. Granger.....	136 N. Y. Supp. 485; affd., sub nom. Klinefelter v. Peterson, 152 App. Div. 896.....	834
Kling v. Corning News Co.....	208 N. Y. 334.....	675
Knowlton v. Moore.....	178 U. S. 41, 56.....	711, 837
Korn v. Campbell.....	192 N. Y. 490, 495.....	429
Kurtz v. Potter.....	44 App. Div. 262; affd., 167 N. Y. 586.....	427

L.

Lahr v. Metropolitan Elev. R. Co...	104 N. Y. 268.....	502, 505
Lake v. Lake.....	194 N. Y. 179.....	823
Lamoureux v. Hewit.....	5 Wend. 307.....	228
Lamphear v. MacLean.....	176 App. Div. 473.....	934
Lancaster v. Hamburger.....	70 Ohio St. 156; 65 L. R. A. 856.....	703
Lane v. Town of Hancock.....	142 N. Y. 510.....	256
Laroe v. Sugar Loaf Dairy Co.....	180 N. Y. 367.....	834
Lathrop v. Hyde.....	25 Wend. 448.....	703
Lavigne v. Ligue des Patriotes.....	178 Mass. 25, 29.....	394
Lawrence v. Fox.....	20 N. Y. 268.....	806
Lawrence v. Littlefield.....	215 N. Y. 561.....	132
Lawson v. Hogan.....	93 N. Y. 39.....	461
Lawton v. Steele.....	152 U. S. 133, 137.....	829
Leary v. City of Watervliet.....	97 Misc. Rep. 127.....	933
Lee v. Washburn.....	80 App. Div. 410.....	696

TABLE OF CASES CITED.

xlv

	PAGE.
Leggett v. Perkins.....	2 N. Y. 297.....8, 10
Leggett v. Stevens.....	185 N. Y. 70.....478, 479
Lehmann v. Ramo Films, Inc.....	92 Misc. Rep. 418..... 53
Levin v. Dietz.....	194 N. Y. 376..... 908
Levy v. Popper.....	106 App. Div. 394; affd., 186 N. Y. 600..... 736
Lewis v. Ely.....	100 App. Div. 252.....426, 428
Lindner v. Starin.....	128 App. Div. 664..... 696
Livingston v. Mayor, etc.....	8 Wend. 85, 102.....656, 657
Logan v. New York Sugar Refining Co.....	176 App. Div. 660..... 180
Logan v. United States.....	144 U. S. 263, 309..... 225
Loper v. Askin.....	176 App. Div. 934..... 163
Low v. Harmony.....	72 N. Y. 408..... 477
Lowenfeld v. Wimpie.....	139 App. Div. 617; affd., 203 N. Y. 646..... 880
Lowery v. City of New York.....	166 N. Y. Supp. 400; N. Y. L. J. July 1, 1914..... 557
Lowry v. Farmers' Loan & Trust Co.	172 N. Y. 137..... 126

M.

MacNaughton v. Osgood.....	41 Hun, 109..... 596
Mack v. Patchin.....	43 N. Y. 167..... 21
Macey v. Curtis.....	14 S. C. 367, 375 et seq....692, 694
Magar v. Hammond.....	183 N. Y. 387, 390..... 654
Mandell & Co. v. Levy.....	14 Am. Bank. Rep. 549..... 68
Marellis v. Thalhimer.....	2 Paige, 35, 39, 40..... 756
Marshall v. Commercial Travelers' Mutual Accident Assn.....	170 N. Y. 434, 438..... 340
Martin v. N. F. P. Mfg. Co.....	122 N. Y. 165, 172..... 534
Marx v. McGlynn.....	88 N. Y. 357, 358, 371, 375.446, 450
Matter of Backus.....	151 App. Div. 813..... 149
Matter of Baldwin.....	27 App. Div. 506, 509..... 199
Matter of Bankers Investing Co.....	141 App. Div. 591..... 656
Matter of Bargey v. Massaro Maca- roni Co.....	218 N. Y. 410..... 344
Matter of Bavier, No. 1.....	164 App. Div. 358..... 777, 778
Matter of Bavier, No. 2.....	164 App. Div. 363..... 778
Matter of Bolles.....	78 App. Div. 180..... 565
Matter of Brackett.....	114 App. Div. 257..... 565
Matter of Bunce.....	100 Misc. Rep. 385..... 954
Matter of Burns v. Southern Pacific Co.....	215 N. Y. 738..... 390
Matter of Butterwick.....	12 Am. Bank. Rep. 536..... 67
Matter of Carp.....	179 App. Div. 387..... 946
Matter of Carroll v. Knickerbocker Ice Co.....	218 N. Y. 435..... 319

	PAGE.
Matter of City of New York.....	168 N. Y. 134, 143, 145. 619, 620, 625
Matter of City of New York (E. 178th St.).....	107 App. Div. 22; <i>affd.</i> , 183 N. Y. 571..... 3
Matter of City of Rochester.....	136 N. Y. 90..... 656
Matter of Clapp.....	97 Misc. Rep. 576, 578..... 191
Matter of Clark.....	168 N. Y. 427..... 199
Matter of Coleman.....	170 App. Div. 537..... 581
Matter of Collins v. Brooklyn Union Gas Co.....	171 App. Div. 381..... 398
Matter of Connolly.....	71 Misc. Rep. 389..... 8
Matter of Costello v. Taylor.....	217 N. Y. 179..... 237
Matter of Crandall.....	196 N. Y. 127..... 436
Matter of Dale v. Saunders Brothers.	218 N. Y. 59, 63..... 398, 942
Matter of De Voe v. New York State Railways.....	169 App. Div. 472, 476; <i>affd.</i> , 218 N. Y. 318, 320..... 326
Matter of Dupont.....	217 N. Y. 612..... 302
Matter of Easterly.....	202 N. Y. 466..... 928
Matter of Evans.....	169 App. Div. 502..... 578
Matter of Farmers' Loan & Trust Co.....	82 Misc. Rep. 330, 336..... 756
Matter of Farmers' Loan & Trust Co.....	213 N. Y. 168..... 754
Matter of Fischer.....	149 App. Div. 618..... 656
Matter of Garabrant.....	176 App. Div. 186..... 24
Matter of Gihon.....	169 N. Y. 443..... 837
Matter of Glatzl v. Stumpp.....	220 N. Y. 71, 74..... 326
Matter of Grade Crossing Comrs... ..	154 N. Y. 550..... 302
Matter of Green.....	67 Hun, 527, 542..... 446
Matter of Green.....	144 App. Div. 232-234..... 712
Matter of Harteau.....	204 N. Y. 292..... 126
Matter of Hawley.....	100 N. Y. 206..... 191
Matter of Heinaheimer.....	214 N. Y. 361..... 614
Matter of Holzworth.....	166 App. Div. 150; 215 N. Y. 700..... 188
Matter of Hoyt.....	116 App. Div. 217; <i>affd.</i> , 189 N. Y. 511..... 773
Matter of Jeffréy.....	129 App. Div. 791..... 449
Matter of Jensen v. Southern Pacific Co.....	215 N. Y. 514..... 390
Matter of Kass.....	U. S. Dist. Court, Southern Dist. of N. Y., October, 1916. 69
Matter of Kellogg.....	187 N. Y. 355, 358..... 7
Matter of Kellogg.....	214 N. Y. 460, 466, 467... 247, 248
Matter of Kennedy.....	167 N. Y. 176..... 448
Matter of Kenny.....	92 Misc. Rep. 330, 338..... 188

TABLE OF CASES CITED.

xlvi

	PAGE.
Matter of Kernochan.....	104 N. Y. 618, 623, 629..... 128
Matter of King.....	174 App. Div. 930..... 932
Matter of Klatzl.....	216 N. Y. 83, revg. 166 App. Div. 921..... 713
Matter of Klugh.....	176 App. Div. 187..... 24
Matter of Kohler.....	20 Am. Bank. Rep. 89..... 67
Matter of Leonard.....	127 App. Div. 493; affd., 193 N. Y. 655..... 150
Matter of Marx.....	115 App. Div. 448..... 150
Matter of Mayor (Cromwell Ave.)...	96 App. Div. 424..... 3
Matter of Mayor (Morris Ave.).....	118 App. Div. 122..... 655
Matter of Maytag-Mason Motor Co.....	35 Am. Bank. Rep. 160..... 68
Matter of McCormick.....	40 App. Div. 73; affd., 163 N. Y. 551..... 6, 7, 10
Matter of McKelway.....	176 App. Div. 929; revd., 221 N. Y. 15..... 453, 711
Matter of Melenbacker v. Village of Salamanca.....	188 N. Y. 370..... 302
Matter of Mitchell v. Boyle.....	219 N. Y. 242, 249..... 692, 908
Matter of Moore v. Lehigh Valley R. R. Co.....	169 App. Div. 177, 187..... 399
Matter of Moskovitz.....	169 App. Div. 527..... 150
Matter of Murphy.....	80 App. Div. 238..... 679
Matter of Myer.....	184 N. Y. 54..... 448
Matter of New York, L. & W. R. R. Co.....	98 N. Y. 447, 453..... 199
Matter of Osborne.....	209 N. Y. 450, 476, 477... 120, 121 125, 126, 132
Matter of Osgoodby.....	169 App. Div. 626..... 150
Matter of Palmieri.....	176 App. Div. 58..... 366
Matter of Plass v. Central New England R. Co.....	169 App. Div. 826..... 352
Matter of Post v. Burger & Gohlke..	216 N. Y. 544..... 389
Matter of Pritchett.....	122 App. Div. 8..... 150
Matter of Quitman.....	152 App. Div. 865..... 150
Matter of Rapid Transit Railroad Comrs.....	197 N. Y. 81, 96, 97, 102, 105.. 502 504, 505
Matters of Rodgers.....	11 Am. Bank. Rep. 79..... 67
Matter of Rogers.....	22 App. Div. 428, 436, 437; 161 N. Y. 108, 112, 113.... 121 122, 128, 131, 132
Matter of Ryer.....	120 App. Div. 154..... 26
Matter of Schell... ..	128 N. Y. 67..... 907
Matter of Schoonmaker v. Prender- gast.....	171 App. Div. 312..... 656

	PAGE.
Matter of Simmons (Ashokan Reservoir, Sec. No. 7).....	130 App. Div. 359; affd., 195 N. Y. 573; affd., sub nom. McGovern v. New York, 229 U. S. 363..... 688
Matter of Singer.....	156 App. Div. 85..... 150
Matter of Smith.....	95 N. Y. 516..... 449
Matter of Soriano.....	166 App. Div. 935; affd., 216 N. Y. 720..... 438
Matter of Starbuck.....	137 App. Div. 866..... 712
Matter of Steinway Co. v. Prendergast.....	142 App. Div. 905..... 656
Matter of Stevens.....	187 N. Y. 471..... 134
Matter of Stubbe v. Adamson.....	220 N. Y. 459..... 517, 826
Matter of Tilden.....	98 N. Y. 434..... 191
Matter of Tilley.....	166 App. Div. 240, 243..... 712
Matter of Torge v. Village of Salamanca.....	176 N. Y. 324..... 302
Matter of Town of Guilford.....	85 App. Div. 207..... 688
Matter of Union Bank.....	204 N. Y. 313, 317..... 540
Matter of Walker.....	136 N. Y. 20, 29..... 364
Matter of Warrin.....	56 App. Div. 414..... 540
Matter of Wilson v. Dorfinger & Sons.....	218 N. Y. 84..... 350
Matter of Winfield v. N. Y. C. & H. R. R. Co.....	216 N. Y. 284..... 34, 390
Matter of Woodward.....	117 N. Y. 522..... 477, 478
Matter of Ziegler.....	218 N. Y. 544, 551..... 246
Matter of Ziegler v. Cassidy's Sons.....	220 N. Y. 98, 111..... 364
Mattley v. Wolfe.....	175 Fed. Rep. 619..... 470
Mayor, etc., v. Law.....	125 N. Y. 380, 394; 6 N. Y. Supp. 628, 633..... 623, 629
Mayor, etc., v. Mabie.....	13 N. Y. 151, 159..... 21, 22
McCarthy v. McAllister Steamboat Co.....	94 Misc. Rep. 692..... 53
McCormack v. Security Mutual Life Ins. Co.....	220 N. Y. 447, revg. 161 App. Div. 33..... 493
McDonald v. Massachusetts General Hospital.....	120 Mass. 432, 435..... 679, 683
McDonald v. Metropolitan St. R. Co.....	167 N. Y. 66..... 420
McGean v. Parsons.....	150 App. Div. 208..... 611
McKinley v. Hessen.....	202 N. Y. 24..... 735
McLouth v. Hunt.....	154 N. Y. 179..... 125
McNulty Brothers v. Offerman.....	141 App. Div. 730..... 675
Meehan v. Morewood.....	52 Hun, 566; affd., 126 N. Y. 667..... 653
Meigs v. Roberts.....	162 N. Y. 371, 378..... 749

TABLE OF CASES CITED.

xlix

PAGE.

Meissner v. Atlantic Hygienic Ice Co.....	176 App. Div. 934.....	169
Melcher v. Ocean Accident & Guarantee Corporation, Ltd.....	175 App. Div. 77.....	269
Mellen v. Athens Hotel Co.....	153 App. Div. 391.....	328
Melton v. Fullerton-Weaver Realty Co.....	214 N. Y. 571.....	665
Mercantile Nat. Bank v. Mayor, etc.	172 N. Y. 35.....	252
Metropolitan Elevated R. Co. v. Kneeland.....	120 N. Y. 134.....	456
Meyer v. Knickerbocker Life Ins. Co.	73 N. Y. 516.....	495
Miesell v. Globe Mut. Life Ins. Co..	76 N. Y. 115.....	495
Miller v. Clary.....	210 N. Y. 127.....	427
Miller v. Gaston.....	2 Hill, 188.....	228
Miller v. Gilbert.....	144 N. Y. 68.....	673
Milliken Bros., Inc., v. City of New York.....	201 N. Y. 65.....	108
Mills v. Garrison.....	3 Keyes, 40.....	648
Mills v. Gould.....	42 N. Y. Super. Ct. 119.....	457
Mills v. Husson.....	140 N. Y. 99.....	777
Mills v. United States Printing Co...	99 App. Div. 611.....	275
Miner v. Rembt.....	178 App. Div. 173.....	930
Minneapolis & St. Louis R. R. Co. v. Winters.....	242 U. S. 353.....	35
Mitchell v. Reid.....	192 N. Y. 263.....	426
Mobile Light & Railroad Co. v. MacKay.....	158 Ala. 51.....	114
Moch v. Security Bank.....	166 App. Div. 121, 125.....	60
Moller v. Presbyterian Hospital.....	65 App. Div. 134.....	426
Montgomery v. Boyd.....	78 App. Div. 64.....	684
Mooney v. Mooney.....	29 Misc. Rep. 707.....	565
Moore v. Board of Education.....	121 App. Div. 862; affd., 195 N. Y. 614.....	557
Moore v. Hegeman.....	72 N. Y. 376.....	10
Moran v. Chase.....	52 N. Y. 346.....	106
Moran v. Vreeland.....	61 Misc. Rep. 664, 672; affd., 162 App. Div. 907.....	603
Morgan v. Bon Bon Co., Inc.....	165 App. Div. 89.....	597
Morgan v. Fullerton.....	9 App. Div. 233.....	655, 656
Morris v. Hofferberth.....	81 App. Div. 512.....	61
Morrison v. Chapman.....	155 App. Div. 509.....	61
Moasher v. Lewis.....	14 App. Div. 565.....	106
Mott v. Consumers' Ice Co.....	73 N. Y. 543, 547.....	653
Muhlker v. Harlem R. R. Co.....	197 U. S. 544, 563, 571.....	505-507
Murdock v. Murdock.....	148 App. Div. 564.....	744
Murray v. Harbor & Suburban B. & S. Assn.....	91 App. Div. 397.....	461

Myers v. Sturgis.....	123 App. Div. 470; <i>affd.</i> , 197 N. Y. 526.....	597
-----------------------	---	-----

N.

National Bank of Commerce of Rochester, N. Y., v. City of Water- vliet.....	97 Misc. Rep. 121.....	944
National Protective Assn. v. Cum- ming.....	170 N. Y. 315.....	274, 277, 284
Navratil v. Bohm.....	26 App. Div. 460.....	670
Neeson v. Bray.....	19 N. Y. Supp. 841.....	513
Neftel v. Lightstone.....	77 N. Y. 96, 99.....	234
Neilson v. Blight.....	1 Johns. Cas. 205, 210.....	613
New Process Fermentation Co. v. Koch.....	21 Fed. Rep. 580.....	848
New York Central & H. R. R. R. Co. v. Mills.....	160 App. Div. 6.....	688
New York Central & H. R. R. R. Co. v. Newbold.....	166 App. Div. 193.....	688, 689
Newton v. Porter.....	69 N. Y. 133.....	873
Newton Co. v. Erickson.....	70 Misc. Rep. 291; <i>affd.</i> , 144 App. Div. 939.....	280
Noah v. Bank for Savings.....	171 App. Div. 191.....	59
Noah's Case.....	3 City Hall Recorder, 13, 20...	851

O.

O'Connor v. Webber.....	163 App. Div. 175; 219 N. Y. 439.....	307
O'Donoghue v. Boies.....	159 N. Y. 87, 98, 99.....	364, 367
Ogden v. City of New York.....	141 App. Div. 578.....	505
Ottenot v. New York, L. & W. R. Co.	119 N. Y. 603.....	500
Outerbridge v. Campbell.....	87 App. Div. 597, 599.....	815

P.

Paine v. Com. State Land Office....	66 Mich. 245, 248.....	694
Palmer v. Treasurer & Receiver General.....	222 Mass. 263, 265.....	711
Park & Sons Co. v. Nat. Druggists' Assn.....	175 N. Y. 1, 40.....	274, 275
Peck v. Burr.....	10 N. Y. 294, 299.....	370
Peeke v. Hydraulic Construction Co.....	23 App. Div. 393.....	457
Pennsylvania Railroad v. Puritan Coal Co.....	237 U. S. 121, 127.....	801
Pennsylvania Railroad v. Sonman Coal Co.....	242 U. S. 120.....	801

TABLE OF CASES CITED.

li

	PAGE.
Pennsylvania R. R. Co. v. Titus.....	216 N. Y. 17, 22..... 801, 802
People v. Bihler.....	154 App. Div. 618; <i>affd.</i> , 210 N. Y. 592..... 855
People v. Butler, Inc.....	134 App. Div. 151; 148 id. 928; <i>affd.</i> , 212 N. Y. 613..... 719
People v. Davis.....	159 App. Div. 464..... 280
People v. De Garmo.....	179 N. Y. 130, 134..... 906
People v. Eastman.....	188 N. Y. 478..... 882, 883
People v. Eberhart.....	171 App. Div. 458..... 307
People v. Fisher.....	24 Wend. 215..... 692
People v. Gibson.....	24 App. Div. 12..... 906
People v. Gregg.....	59 Hun, 107..... 932
People v. Kalbfleisch Co.....	174 App. Div. 108..... 29
People v. Keeler.....	17 N. Y. 370, 374..... 693
People v. Ladew.....	189 N. Y. 355..... 749
People v. Marcus.....	185 N. Y. 258..... 274
People v. Meyer.....	12 Misc. Rep. 613..... 437
People v. Montgomery.....	13 Abb. Pr. (N. S.) 207, 240.. 610
People v. Nelson.....	153 N. Y. 90, 94..... 848
People v. New York Carbonic Acid Gas Co.....	196 N. Y. 431..... 689
People v. Richards.....	108 N. Y. 137, 150..... 350
People v. Rosen.....	208 N. Y. 169..... 661
People v. St. Clair.....	90 App. Div. 239..... 194
People v. Santa Clara Lumber Co..	213 N. Y. 61..... 370
People v. Snedeker.....	14 N. Y. 52, 59..... 691
People (Complaint of Soriano) v. Soriano.....	157 App. Div. 892..... 438
People v. Von Den Corput.....	177 App. Div. 682..... 907
People ex rel. Batchelor v. Bacon...	37 App. Div. 414..... 935
People ex rel. Benger v. Davis.....	100 Misc. Rep. 334..... 944
People ex rel. Bierach v. York.....	36 App. Div. 185..... 555
People ex rel. Binghamton Light, H. & P. Co. v. Stevens.....	203 N. Y. 7, 20..... 844
People ex rel. Boenig v. Hegeman...	220 N. Y. 118..... 749
People ex rel. Bridge Operating Co. v. Public Service Comm.....	153 App. Div. 129, 137..... 842
People ex rel. City of New York v. Hennessy.....	157 App. Div. 786, 787, 788; <i>affd.</i> , 210 N. Y. 617, 154, 155, 159
People ex rel. City of New York v. Lyon.....	114 App. Div. 583..... 159
People ex rel. City of New York v. Sandrock Realty Co.....	149 App. Div. 651, 656; <i>affd.</i> , 207 N. Y. 771..... 155, 160, 162
People ex rel. Commissioners of Charities v. Cullen.....	153 N. Y. 629..... 436

	PAGE.
People ex rel. Conklin v. Boyle.....	98 Misc. Rep. 364..... 908
People ex rel. Dawson v. Duffey.....	177 App. Div. 949..... 302
People ex rel. Dole v. Town of Ham- burg.....	58 Misc. Rep. 643; 127 App. Div. 948; affd., 193 N. Y. 614. 302
People ex rel. Empire State Dairy Co. v. Sohmer.....	218 N. Y. 199..... 308
People ex rel. Ferguson v. Reardon..	197 N. Y. 236..... 831
People ex rel. Fiske v. Woods.....	173 App. Div. 355..... 557
People ex rel. Gill v. Smith.....	5 N. Y. Crim. Rep. 513..... 276
People ex rel. Goetting v. Schnitzer..	71 N. Y. Supp. 320..... 438
People ex rel. Hurlbut v. Bingham...	186 N. Y. 538..... 554
People ex rel. Jackson v. Potter.....	47 N. Y. 375, 379..... 694
People ex rel. New York Disposal Corporation v. Freschi.....	173 App. Div. 189..... 29, 31
People ex rel. New York Institute for Blind v. Fitch.....	154 N. Y. 14, 30, 31..... 679
People ex rel. New York & Queens Gas Co. v. McCall.....	219 N. Y. 84..... 938
People ex rel. Rochester Telephone Co. v. Priest.....	181 N. Y. 300..... 252, 254
People ex rel. Stone v. Minck.....	21 N. Y. 539..... 539
People ex rel. Tims v. Bingham.....	166 N. Y. Supp. 28; N. Y. L. J. April 5, 1906..... 554
People ex rel. Trustees v. Mezger...	98 App. Div. 237..... 679
People ex rel. Ukers v. Ukers.....	172 App. Div. 907..... 438
People ex rel. Union Trust Co. v. Coleman.....	126 N. Y. 433, 439..... 602
People ex rel. Weller v. Townsend...	102 N. Y. 439..... 692
People ex rel. White v. Clinton.....	28 App. Div. 478, 479..... 378
People ex rel. Wilson v. Knox.....	45 App. Div. 537, 542..... 887
People ex rel. Woods v. Crissey.....	91 N. Y. 636..... 694
People's Trust Co. v. Smith.....	215 N. Y. 489..... 61
Perry v. Dickerson.....	85 N. Y. 345..... 646
Peterson v. Martino.....	210 N. Y. 412..... 749
Pettibone v. Drakeford.....	37 Hun. 628..... 70
Pettit v. Pettit.....	105 App. Div. 312..... 436
Phenix Nat. Bank v. Waterbury.....	197 N. Y. 161..... 471
Pimel v. Betjemann.....	183 N. Y. 194..... 477
Plant System, etc., v. Dickerson.....	118 Ga. 647..... 683
Pond v. Metropolitan Elevated R. Co.....	112 N. Y. 186..... 500
Porges v. U. S. Mortgage & Trust Co.	203 N. Y. 181..... 60
Porter v. Williams.....	9 N. Y. 142, 147..... 70
Post v. Hover.....	33 N. Y. 593..... 479
Potter v. Rossiter, No. 4.....	109 App. Div. 737, 739..... 199
Potts v. Hart.....	99 N. Y. 168..... 68
Powers v. Powers.....	33 App. Div. 126..... 437

TABLE OF CASES CITED.

liii

	PAGE.
Pratt & Whitney Co. v. Pneumatic Tool Co.....	50 App. Div. 369..... 488
Pray v. Hegeman.....	92 N. Y. 508..... 775
Price v. Society for Savings.....	64 Conn. 362..... 679
Pringle v. Burroughs.....	100 App. Div. 366; affd., 185 N. Y. 375..... 449
Prowell v. State ex rel. Hasty.....	142 Ala. 80..... 692

Q.

Quarman v. Burnett.....	6 M. & W. 499..... 408
Quin v. Moore.....	15 N. Y. 434..... 457
Quinn v. Brooklyn Heights R. R. Co.....	88 App. Div. 57..... 670

R.

Rastetter v. Hoenninger.....	214 N. Y. 66, 71..... 191
Raubitschek v. Blank.....	80 N. Y. 480..... 259
Ravenswood Paper Mill Co. v. Dix.....	61 Misc. Rep. 235..... 835
Reed v. Sobel.....	177 App. Div. 532..... 428, 913
Reese v. Walworth.....	61 App. Div. 64..... 484
Reid v. Fargo.....	213 Fed. Rep. 771, 773; affd., 241 U. S. 544, 551..... 784
Reinman v. Little Rock.....	237 U. S. 171..... 516, 829
Rexford v. Knight.....	11 N. Y. 308..... 657
Reynolds v. Cleary.....	61 Hun. 590..... 740
Riggs v. Cragg.....	89 N. Y. 479..... 125
Riker v. Comfort.....	140 App. Div. 117..... 908
Riley v. Continuous Rail Joint Co....	110 App. Div. 787; affd., 193 N. Y. 643..... 411
Risley v. Phenix Bank of City of New York.....	83 N. Y. 318, 329, 337, 364, 647, 649
Robertson v. De Brulatour.....	188 N. Y. 301..... 126
Robinson v. Chemical Nat. Bank....	86 N. Y. 404..... 60
Robinson v. Oceanic Steam Nav. Co.	112 N. Y. 315..... 663
Rochkind v. Perlman.....	123 App. Div. 808..... 484
Roesale v. Roesale.....	163 App. Div. 344..... 913
Rogers v. Arnold.....	12 Wend. 30..... 482
Rogers v. N. Y. & T. L. Co.....	134 N. Y. 197, 219..... 603
Roome v. Phillips.....	24 N. Y. 463..... 673
Rosenstock v. Laue.....	140 App. Div. 467..... 408
Rounds v. Del., Lack. & West. R. R. Co.....	64 N. Y. 129, 136..... 653
Rourke v. Elk Drug Co.....	75 App. Div. 145..... 279
Rowell v. Janvrin.....	151 N. Y. 60, 66..... 373
Rowland v. Miller.....	139 N. Y. 93..... 740
Rubber Co. v. Goodyear.....	76 U. S. (9 Wall.) 788, 804..... 679
Rudland v. Crozier.....	2 DeGex & Jones, 143..... 936

	S.	PAGE.
Sage v. Burton.....	84 Hun, 267.....	61
Sage v. Culver.....	147 N. Y. 241.....	723
Sage v. Mayor.....	154 N. Y. 61, 70.....	619, 623, 625
Salisbury v. Howe.....	87 N. Y. 128, 134.....	234
Salter v. Utica & Black River R. R. Co.....	86 N. Y. 401.....	3
Sanders v. Pottlitzer Bros. Fruit Co..	144 N. Y. 209.....	259
Sanford v. Commercial Travelers' Assn.....	86 Hun, 380, 382.....	199
Saranac Land & Timber Co. v. Roberts.....	208 N. Y. 288, 299.....	539
Sauer v. City of New York.....	90 App. Div. 36; affd., 180 N. Y. 27; 206 U. S. 536, 544.....	153 154, 157-159
Sauer v. Mayor.....	44 App. Div. 305.....	153
Savage v. Jones.....	225 U. S. 501.....	832
Schapp v. Bloomer.....	181 N. Y. 125, 128.....	290
Schmidt v. Garfield Nat. Bank.....	64 Hun, 298; affd., 138 N. Y. 681.	60
Schneider v. Union Dime Savings Bank.....	93 Misc. Rep. 166.....	59
Schryer v. Fenton.....	15 App. Div. 158.....	336
Scott v. Guernsey.....	60 Barb. 163; affd., 48 N. Y. 106.....	673
Seagrist v. Reid.....	171 App. Div. 755.....	723, 724
Secor v. Sturgis.....	16 N. Y. 548.....	646
Shailer v. Bumstead.....	99 Mass. 112, 126, 127, 130. 446,	447
Shalek v. Jetter.....	171 App. Div. 364.....	602
Shannahan v. Empire Engineering Corp.....	204 N. Y. 543.....	307
Sharrow v. Inland Lines, Ltd.....	214 N. Y. 101.....	35
Shepard & Morse Lumber Co. v. Eldridge.....	171 Mass. 516.....	61
Sherwin v. People.....	100 N. Y. 351, 361.....	848
Shotwell v. Dixon.....	163 N. Y. 43, 54.....	164
Siegel v. Kovinsky.....	93 Misc. Rep. 541.....	61
Silberman v. Uhrlaub.....	116 App. Div. 869.....	429
Simons v. Mutual Const. Co.....	132 App. Div. 719.....	740
Smith v. Barnes.....	9 Misc. Rep. 368, 370.....	199
Smith v. Bodine.....	74 N. Y. 30.....	696
Smith v. Boston & Albany R. R. Co.	181 N. Y. 132, 137... 155, 159,	302
Smith v. Coe.....	170 N. Y. 162, 167.....	328
Smith v. Dotterweich.....	200 N. Y. 299.....	56
Smith v. Edwards.....	88 N. Y. 92, 104.....	672
Smith v. Erie R. R. Co.....	176 App. Div. 937.....	931
Smith v. Graham.....	161 App. Div. 803; 217 N. Y. 655.....	430

TABLE OF CASES CITED.

lv

PAGE.

Smith v. Keller.....	205 N. Y. 39.....	447
Smith v. Moore.....	199 Fed. Rep. 689.....	179
Smyth v. City of New York.....	203 N. Y. 106.....	409, 410
Snyder v. Sloane.....	65 App. Div. 543.....	229
Sonn v. Heilberg.....	38 App. Div. 515.....	426
Soper v. St. Regis Paper Co.....	76 App. Div. 409.....	484
Southard v. Benner.....	72 N. Y. 424.....	68, 465
Southern Pacific Co. v. Kentucky....	222 U. S. 63.....	390
Spelman v. Freedman.....	130 N. Y. 421.....	68
Spencer v. Lowe.....	198 Fed. Rep. 961.....	180
Spencer v. Weber.....	163 N. Y. 493, 502.....	868
Sperry v. Farmers' Loan & Trust Co.	154 App. Div. 447.....	793, 794
Spier v. Hyde.....	92 App. Div. 467, 472.....	729
St. Regis Paper Co. v. Santa Clara Lumber Co.....	62 App. Div. 538; 186 N. Y. 89, 98.....	461, 676
St. Regis Paper Co. v. Tonawanda Co.....	107 App. Div. 90; affd., 186 N. Y. 563.....	835
Starin v. Kelly.....	88 N. Y. 418.....	676
State ex rel. Sawyer v. Pollner.....	18 Ohio Cir. Ct. 304, 310 et seq.....	692, 694
State of Ohio v. Constable.....	7 Ohio, 7.....	692
Stalz v. Shreck.....	128 N. Y. 263.....	712
Stephens v. Meriden Britannia Co..	160 N. Y. 183.....	70
Stephenson v. Bird.....	25 Am. Bank. Rep. 909.....	68
Stevens v. Episcopal Church History Co.....	140 App. Div. 570.....	597
Stiefel v. New York Novelty Co....	14 App. Div. 371.....	466
Stokes v. Stokes.....	91 Hun, 605.....	723
Stokes v. Stokes.....	155 N. Y. 581, 586.....	330
Stokes v. Stokes.....	198 N. Y. 301, 304.....	366
Stone v. Eisen Co.....	219 N. Y. 205.....	287
Stonebridge v. Perkins.....	141 N. Y. 1.....	482
Storrs v. City of Utica.....	17 N. Y. 104, 108.....	409
Story v. New York Elev. R. R. Co..	90 N. Y. 122.....	505
Stowell v. Otis.....	71 N. Y. 36.....	482
Strong v. Sproul.....	53 N. Y. 497.....	484
Stuart v. Simpson.....	1 Wend. 376.....	164
Stuckey v. Keefe's Executors.....	26 Penn. St. 397, 399.....	712
Sturtevant v. Sturtevant.....	20 N. Y. 39.....	735
Sullivan v. Sprung.....	170 App. Div. 237.....	426
Sumner v. People.....	29 N. Y. 337.....	14, 16
Swift v. Brooklyn Heights R. R. Co.	134 App. Div. 134.....	929
Swift v. Hart.....	35 Hun, 128.....	70
Swift v. Mayor, etc.....	83 N. Y. 528.....	886

T.

PAGE.

Tabor v. Hoffman.....	118 N. Y. 30, 31.....	96, 828
Tallman v. Metropolitan Elevated R. R. Co.....	121 N. Y. 119.....	500
Tauza v. Susquehanna Coal Co.....	220 N. Y. 259.....	202
Teed v. Morton.....	60 N. Y. 506.....	672
Terry v. Westing.....	5 N. Y. Supp. 99; 52 Hun, 610.	513
Thayer v. Burr.....	201 N. Y. 155.....	126
Thayer v. Manley.....	73 N. Y. 305.....	456
Thomas v. Roddy.....	19 Am. Bank. Rep. 873.....	67
Thomas v. Waite Co.....	113 App. Div. 494.....	696
Thompson v. Fairbanks.....	196 U. S. 516.....	470
Thomson v. Bank of British North America.....	82 N. Y. 1.....	59, 61
Thorne v. French.....	4 Misc. Rep. 436; affd., 143 N. Y. 679.....	462
Tierney v. Perkins.....	178 App. Div. 391, 946.....	945-947
Times Square Improvement Co., Inc., v. Fleischmann Vienna Model Bakery, Inc.....	173 App. Div. 633.....	20
Tobey v. Moore.....	130 Mass. 448.....	740
Tone v. Brace.....	Clarke Ch. 503; 11 Paige, 566.	22
Toplitz v. Bauer.....	161 N. Y. 325, 333.....	462
Town of Brookhaven v. Smith.....	188 N. Y. 74, 85.....	619, 625
Town of Venice v. Woodruff.....	62 N. Y. 462, 470.....	611
Turner v. City of Newburgh.....	109 N. Y. 301.....	409
Tuthill v. Long Island R. R. Co.....	75 Hun, 556.....	670

U.

Ullman v. Cameron.....	105 App. Div. 163; affd., 186 N. Y. 339.....	70
Unckles v. Colgate.....	148 N. Y. 529, 539.....	371
Union National Bank v. Underhill..	102 N. Y. 336, 340.....	137
United States v. Williams.....	3 Fed. Rep. 484, 486.....	848, 854
United States Trust Co. v. Soher....	178 N. Y. 442.....	777
Uppington v. City of New York.....	165 N. Y. 222.....	409, 410

V.

Van Publishing Co. v. Westinghouse, Church, Kerr & Co.....	72 App. Div. 121, 126.....	474
Van Tassell v. Manhattan Eye & Ear Hospital.....	15 N. Y. Supp. 620.....	683
Van Tuyl v. Robin.....	160 App. Div. 41; affd., 211 N. Y. 540.....	541, 543
Van Vleck v. Van Vleck.....	21 App. Div. 272.....	565
Vandermulen v. Vandermulen.....	108 N. Y. 195.....	794

TABLE OF CASES CITED.

lvii

PAGE

Vaughn Machine Co. v. Lighthouse..	64 App. Div. 138, 143.....	474
Veszey v. Allen.....	173 N. Y. 359.....	675
Village of Fort Edward v. Fish.....	156 N. Y. 363, 371, 373, 374.....	370, 384

W.

Waisikoski v. Philadelphia & Read- ing C. & I. Co.....	173 App. Div. 538.....	663, 956
Walker v. Cronin.....	107 Mass. 555, 562.....	703
Walsh v. Missouri Pac. R. Co.....	102 Mo. 582, 585.....	114
Walter v. Walter.....	217 N. Y. 439.....	366
Ward v. City Trust Co.....	192 N. Y. 61.....	606
Warner v. Durant.....	76 N. Y. 133.....	672
Warschauser v. Brooklyn Furniture Co.....	150 App. Div. 81.....	702, 703
Waterman v. Whitney.....	11 N. Y. 157, 164.....	446
Webber v. Benbow.....	211 Mass. 366.....	164
Weeks v. United States.....	232 U. S. 383.....	851
Wellington v. Drummer.....	60 N. H. 295.....	395
Wenz v. Franciscan Fathers of Church of Assumption.....	178 App. Div. 949, 955....	949, 955
Wetzel v. Omaha Maternity & General Hospital Assn.....	96 Neb. 636.....	288
Wheeler v. Warner.....	140 App. Div. 695.....	541, 542
Whiteside v. North American Acci- dent Ins. Co.....	200 N. Y. 320.....	339
Whitman v. Egbert.....	27 App. Div. 374.....	164
Whitney v. Butler.....	118 U. S. 655.....	543
Wilber v. New England Order of Protection.....	192 Mass. 477, 479.....	394
Wilcox v. American Telephone & Telegraph Co.....	176 N. Y. 115.....	355
Willard v. Tayloe.....	75 U. S. (8 Wall.) 557, 566....	514
Williams v. City of New York.....	214 N. Y. 259, 264....	241, 242, 298
Wilson v. City of Watertown.....	3 Hun, 508.....	929
Wilson v. Press Pub. Co.....	14 Misc. Rep. 514.....	684
Windmuller v. Goodyear Tire & Rubber Co.....	123 App. Div. 424.....	834, 835
Winter v. Winter.....	191 N. Y. 462.....	611
Wood v. Fisk.....	215 N. Y. 233.....	471

Y.

Yeoman v. McClenahan.....	190 N. Y. 121, 127.....	869
---------------------------	-------------------------	-----

lviii NEW YORK STATE CONSTITUTION CITED.

UNITED STATES CONSTITUTION CITED.

	PAGE.		PAGE.
U. S. Const. generally.....	828	U. S. Const. 14th Amendt.,	
		§ 1.....	515, 516, 828

UNITED STATES REVISED STATUTES CITED.

	PAGE.
U. S. R. S. §§ 4137, 4141, 4178.....	389

UNITED STATES STATUTES AT LARGE CITED.

	PAGE.		PAGE.
24 U. S. Stat. at Large, 379,		32 U. S. Stat. at Large, 799, 800,	
§ 1.....	785, 786	§ 13.....	64-67, 70
30 U. S. Stat. at Large, 464, chap.		32 U. S. Stat. at Large, 800,	
448, § 29 et seq.....	837	§ 16.....	66, 67, 70
30 U. S. Stat. at Large, 549, 550,		34 U. S. Stat. at Large, 584,	
§ 12.....	66, 67, 70	§ 1.....	785, 786
30 U. S. Stat. at Large, 550,		35 U. S. Stat. at Large, 65,	
§ 13.....	66, 67, 70	chap. 149.....	34, 35, 390
30 U. S. Stat. at Large, 550,		36 U. S. Stat. at Large, 291,	
§ 14, subd. c.....	63, 66, 67	chap. 143.....	34, 35, 390
30 U. S. Stat. at Large, 550,		36 U. S. Stat. at Large, 544,	
§ 17.....	471	§ 7.....	785, 786
30 U. S. Stat. at Large, 557,		36 U. S. Stat. at Large, 839,	
§ 47.....	67, 70	§ 5.....	66, 67, 70
30 U. S. Stat. at Large, 562,		36 U. S. Stat. at Large, 840,	
§ 60.....	64-67, 70	§ 8.....	67, 70
30 U. S. Stat. at Large, 562, § 63.	471	36 U. S. Stat. at Large, 842,	
30 U. S. Stat. at Large, 565, 566,		§ 11.....	64-67, 70
§ 70.....	66, 67, 70	39 U. S. Stat. at Large, 777,	
32 U. S. Stat. at Large, 798, § 5.	471	chap. 463, tit. 2, § 201 et	
32 U. S. Stat. at Large, 799,		seq.....	836-838
§ 10.....	67, 70		

NEW YORK STATE CONSTITUTION CITED.

	PAGE.		PAGE.
Const. generally.....	274, 277, 322	Const. art. 7, § 7.....	370, 371
	693, 828	Const. art. 8, § 7.....	537
art 1, § 1.....	274, 277, 379	Const. art. 10, § 1.....	692, 716
art. 1, § 6.....	274, 277, 504, 515	Const. art. 10, § 5.....	692
	828, 831	Const. art. 10, § 6.....	693

NEW YORK REVISED STATUTES CITED.

	PAGE.		PAGE.
1 R. S. 726, §§ 37, 38.....	774	1 R. S. 756, § 1 et seq.....	21, 22
1 R. S. 726, § 40.....	774, 775	2 R. S. 63, § 40.....	189, 190
1 R. S. 728, § 55, subd. 3.....	8-10	2 R. S. 695, § 27.....	852, 853
1 R. S. 738, § 140.....	21, 22	2 R. S. 695, § 28.....	852

GENERAL LAWS CITED.

	PAGE.		PAGE.
Gen. Laws, chap. 3, § 19.....	887	Gen. Laws, chap. 46, § 76, subd.	
chap. 18, § 230,		3.....	9, 10
subd. 16.....	717, 718	chap. 46, §§ 205,	
chap. 21, § 322.....	293, 294	216.....	21, 22
chap. 24, § 45.....	252, 253	chap. 46, § 240.....	22
chap. 24, § 132.....	749, 750	chap. 47, § 3... 133,	134
chap. 36, § 23.....	600	chap. 47, § 7.....	67
chap. 46.....	21, 22	chap. 48, § 51 et	
chap. 46, art. 8.....	22	seq., as amd.....	7
chap. 46, § 1.....	21, 22	chap. 51, § 5.....	137
chap. 46, § 53.....	774		
	775, 777		

CONSOLIDATED LAWS CITED.

	PAGE.		PAGE.
Consol. Laws, chap. 1, § 30....	349	Consol. Laws, chap. 11, § 240...	717
chap. 1, §§ 200,		chap. 11, § 240,	
201.....	719	subds. 16, 18...	717
chap. 2, § 2*.....	541		718
chap. 2, § 19*.....	537	chap. 13, § 17. ..	771
	538, 539		772
chap. 2, § 57 et		chap. 13, § 21... 189	
seq.†.....	63		190
chap. 2, § 71*.....	537	chap. 13, §§ 80,	
chap. 5, § 145.....	331	88.... 262-264,	266
	332	chap. 13, § 98, as	
chap. 7, § 20.....	887	amd.....	247
chap. 11, § 180...	692	chap. 13, § 100.. 394	
	693		395, 397
chap. 11, § 181...	691	chap. 14, § 7.....	366

* Laws of 1909, chap. 10.— [REP. † Laws of 1914, chap. 369.— [REP.

	PAGE.		PAGE.
Consol. Laws, chap. 17, § 292...	692	Consol. Laws, chap. 41, § 31....	259
chap. 23, § 90....	591	chap. 41, § 36....	912
597, 603, 720		chap. 41, § 44....	912
chap. 23, § 90,		chap. 41, § 62 et	
subd. 1.....	601	seq.....	468
chap. 23, § 90,		chap. 41, §§ 93,	
subd. 2....	591, 601	95, 130, 150....	422
chap. 23, § 91.....	591, 601	chap. 45, arts. 4,	
chap. 23, § 91a....	465	11, 11a.....	832
	466	chap. 47, § 4....	693
chap. 23, §§ 156,		chap. 47, § 15....	694
161.....	540	chap. 48, § 66,	
chap. 23, § 308....	720	subd. 2... 937, 938	
chap. 28, § 92....	493	chap. 48, § 66,	
	494, 495	subd. 4... 841, 842	
chap. 30, § 88,		chap. 48, § 69....	842
subd. 3.....	911	chap. 49, § 83....	326
chap. 30, § 477... 911		chap. 49, § 92....	302
chap. 31, art. 2... 289		chap. 49, § 178... 929	
290, 291, 306-309		chap. 50.....	21
chap. 31, art. 14.. 169		chap. 50, art. 12.. 901	
chap. 31, § 2.... 290		chap. 50, § 63... 777	
291, 307, 308, 798		chap. 50, §§ 91-94. 735	
chap. 31, § 8a.... 289		chap. 50, § 96,	
290, 291, 306-309		subd. 3..... 9, 10	
chap. 31, § 8a,		chap. 50, § 242... 735	
subd. 1..... 290			907
chap. 31, § 8a,		chap. 50, § 265... 736	
subd. 2, cl. (f).. 308		chap. 50, § 371... 901	
	309	chap. 53, § 99.... 301	
chap. 31, § 8a,			302
subd. 3.... 290, 306		chap. 53, § 142... 378	
chap. 31, § 161,		379, 380	
subd. 2.... 797, 798		chap. 53, § 242... 377	
chap. 33, § 3.... 106		378-380	
chap. 33, § 10... 101		chap. 53, § 250.. 378	
	107, 108	chap. 53, § 251.. 378	
chap. 37, § 19... 389			379
chap. 38..... 227		chap. 59, § 28.... 595	
chap. 38, § 35.. 56		599, 630, 602	
chap. 38, §§ 91, 98. 458		chap. 59, § 33.... 658	
chap. 39, § 5.... 137			659
chap. 41, § 11.... 633		chap. 59, § 55.... 597	
	634		602
chap. 41, § 15.... 133		chap. 59, § 56.... 597	
chap. 41, § 19.... 63		chap. 59, § 66.... 464	
	67-70	465, 466, 595, 597	
chap. 41, § 23.... 145		598, 599, 603	

CONSOLIDATED LAWS CITED.

lxi

PAGE.	PAGE.
Consol. Laws, chap. 60, art. 10,	Consol. Laws, chap. 67..... 32-34
as amd.... 928, 954	325, 343, 344, 343
chap. 60, § 4,	347-350, 352, 353
subd. 7... 678, 679	386-390, 398, 399
chap. 60, § 132... 750	942, 943, 945-947
chap. 60, § 220 et	chap. 67, § 2..... 349
seq., as amd.... 836	chap. 67, § 2,
837, 838	group 8.... 387-389
chap. 60, § 220... 712	chap. 67, § 2,
chap. 60, § 220,	group 10..... 351
subd. 7 (new)... 452	chap. 67, § 2,
453, 454, 709-711	group 15.. 343, 344
713	chap. 67, § 2,
chap. 60, §§ 290-	groups 29, 30.. 348
296, as amd.... 252	349
chap. 60, § 290... 252	chap. 67, § 2,
chap. 60, § 291.. 252	group 33... 348-350
253	chap. 67, § 2,
chap. 60, §§ 292-	group 34.. 348, 349
296, as amd.... 252	chap. 67, § 2,
chap. 62, § 98,	group 41.. 236, 237
subd. 1.... 322, 323	chap. 67, § 2,
chap. 63, § 62.... 937	group 42..... 344
938	chap. 67, § 3,
chap. 64, § 341... 293	subd. 4..... 237
294	chap. 67, § 3,
chap. 65..... 322, 372	subd. 5..... 344
chap. 65, § 9..... 322	chap. 67, § 3,
chap. 65, § 50,	subd. 7.... 351-353
subd. 11, ¶ (b)*. 322	chap. 67, § 11.... 346
chap. 65, § 53*.. 322	chap. 67, § 15,
323	subd. 3..... 320
chap. 65, § 94†... 322	chap. 67, § 20.... 398
323	399
chap. 65, § 185,	chap. 67, § 21.... 319
subd. 1†..... 373	chap. 67, § 23.... 324
chap. 65, § 185,	chap. 67, § 50. 345-347
subd. 6†... 372, 373	chap. 67, §§ 51, 52. 346
chap. 65, § 185,	chap. 67, § 114... 388
subd. 8†..... 373	390

* Laws of 1916, chap. 451.— [REF. † Laws of 1912, chap. 444.— [REF.
 ‡ Laws of 1912, chap. 318.— [REF.

SESSION LAWS CITED.

	PAGE.		PAGE.
1807, chap. 115.....	620	1896, chap. 272, § 51, et seq., as amd.....	7
1830, " 320, § 10.....	8-10	1896, " 547.....	21, 22
1848, " 319.....	383	1896, " 547, art. 8.....	22
1848, " 319, § 6.....	383-385	1896, " 547, § 1.....	21, 22
1850, " 340.....	852, 853	1896, " 547, § 53..	774, 775, 777
1852, " 285.....	620, 625, 629	1896, " 547, § 76, subd. 3..	9, 10
1855, " 121.....	620	1896, " 547, §§ 205, 216..	21, 22
1857, " 763.....	620, 626	1896, " 547, § 240.....	22
1858, " 314.....	67	1896, " 908, § 45.....	252, 253
1867, " 871.....	852	1896, " 908, § 132.....	749, 750
1868, " 150.....	626	1897, " 378.....	3, 4, 553
1871, " 819.....	588	1897, " 378, § 302.....	555
1872, " 487.....	626	1897, " 378, § 951.....	155
1874, " 39, tit. 10, § 30.	293, 294	1897, " 378, § 990.....	2
1874, " 323, p. 388.....	717, 718	1897, " 378, § 1002.....	2, 3
1881, " 676, § 317.....	883	1897, " 378, § 1608.....	556
1881, " 676, § 642.....	853	1897, " 414, § 322.....	293, 294
1882, " 410.....	3, 553	1897, " 417, § 3.....	133, 134
1882, " 410, § 272.....	555, 556	1897, " 417, § 7.....	67
1882, " 410, §§ 711-728....	629	1897, " 420, § 5.....	137
1882, " 410, § 733.....	626	1897, " 664.....	160
1882, " 410, § 873.	155, 158, 162	1899, " 370.....	885, 887
1884, " 180, § 7.....	555, 556	1899, " 370, § 19.....	887
1884, " 380.....	883	1899, " 712.....	252, 253
1886, " 293.....	293, 294	1900, " 254.....	252, 253
1887, " 576.....	152, 156, 162	1900, " 588.....	853
1887, " 692.....	883	1900, " 731.....	883
1887, " 697.....	629	1901, " 354.....	600
1889, " 487.....	67	1901, " 466.....	3, 4, 554
1891, " 105, as amd.....	412	1901, " 466, § 119.....	141
1891, " 105, § 17, subda. 5, 11.....	412	1901, " 466, §§ 242a, 242b..	510
1892, " 413.....	160	1901, " 466, § 284.....	551, 552
1892, " 686, § 230, subd. 16.....	717, 718	1901, " 466, § 299.	551, 552, 557
1892, " 688, § 23.....	600	1901, " 466, § 300.....	181
1893, " 537.....	884-887	1901, " 466, § 302..	181, 552-556
1894, " 147.....	160-162	1901, " 466, § 685.....	435-437
1894, " 147, § 3.....	162	1901, " 466, § 740.....	557
1894, " 512.....	153, 157, 162	1901, " 466, § 951.....	155
1894, " 567.....	884-887	1901, " 466, § 1002.....	3
1894, " 567, §§ 6, 7.....	885	1901, " 466, § 1608.....	556
1894, " 740.....	67	1903, " 87.....	133, 134
1895, " 287.....	853	1903, " 623.....	383-385
		1904, " 341.....	181

SESSION LAWS CITED.

lxiii

	PAGE.		PAGE.
1905, chap. 441.....	853	1909, chap. 36, § 8a, subd. 2,	
1905, " 449.....	22	cl. (f).....	308, 309
1905, " 637.....	551, 552, 557	1909, " 36, § 8a, subd. 3...	290
1907, " 160.....	551, 552, 557		306
1907, " 278.....	551, 552	1909, " 36, § 161, subd. 2..	797
1907, " 429, § 66, subd. 4...	841		798
	842	1909, " 38, § 3.....	106
1908, " 300.....	293, 294	1909, " 38, § 10... 101, 107,	108
1909, " 9, § 30.....	349	1909, " 42, § 19.....	389
1909, " 9, §§ 200, 201.....	719	1909, " 43.....	227
1909, " 10, § 2.....	541	1909, " 43, § 35.....	56
1909, " 10, § 19.....	537-539	1909, " 43, §§ 91, 98.....	458
1909, " 10, § 71.....	537	1909, " 44, § 5.....	137
1909, " 13, § 145.....	331, 332	1909, " 45, § 11.....	633, 634
1909, " 15, § 20.....	887	1909, " 45, § 15.....	133
1909, " 16, § 180.....	692, 693	1909, " 45, § 19.....	63, 67-70
1909, " 16, § 181.....	691	1909, " 45, § 23.....	145
1909, " 16, § 240.....	717	1909, " 45, § 31.....	259
1909, " 16, § 240, subds. 16,		1909, " 45, §§ 36, 44.....	912
18.....	717, 718	1909, " 45, § 62 et seq.....	468
1909, " 18, § 17.....	771, 772	1909, " 45, §§ 93, 95, 130,	
1909, " 18, § 21.....	189, 190	150.....	422
1909, " 18, §§ 80, 88... 262-264		1909, " 49, arts. 4, 11, 11a..	832
	266	1909, " 51, § 4.....	693
1909, " 18, § 98, as amd....	247	1909, " 51, § 15.....	694
1909, " 18, § 100.. 394, 395, 397		1909, " 52.....	21
1909, " 19, § 7.....	366	1909, " 52, art. 12.....	901
1909, " 22, § 292.....	692	1909, " 52, § 63.....	777
1909, " 28, § 90... 591, 597, 603		1909, " 52, §§ 91-94.....	735
	720	1909, " 52, § 96, subd. 3.. 9, 10	
1909, " 28, § 90, subd. 1....	601	1909, " 52, § 242.....	735, 907
1909, " 28, § 90, subd. 2....	591	1909, " 52, § 265.....	736
	601	1909, " 52, § 371.....	901
1909, " 28, § 91.....	591, 601	1909, " 55, § 99.....	301, 302
1909, " 28, § 91a.....	465, 466	1909, " 55, § 142.....	378-380
1909, " 28, §§ 156, 161.....	540	1909, " 55, § 242.....	377-380
1909, " 28, § 308.....	720	1909, " 55, § 250.....	378
1909, " 33, § 92.....	493-495	1909, " 55, § 251.....	378, 379
1909, " 35, § 88, subd. 3....	911	1909, " 61, § 28... 595, 599, 600	
1909, " 35, § 477.....	911		602
1909, " 36, art. 2.. 289-291, 306		1909, " 61, § 33.....	658, 659
	307-309	1909, " 61, § 55.....	597, 602
1909, " 36, art. 14.....	169	1909, " 61, § 56.....	597
1909, " 36, § 2.... 290, 291, 307		1909, " 61, § 66... 464-466, 595	
	308, 798		597-599, 603
1909, " 36, § 8a... 289-291, 306		1909, " 62, art. 10, as amd..	928
	307-309		954
1909, " 36, § 8a, subd. 1....	290	1909, " 62, § 4, subd. 7.. 678, 679	

	PAGE.		PAGE.
1909, chap. 62, § 132.....	750	1911, chap. 647, § 9.....	322
1909, " 62, § 220 et seq., as amd.....	836-838	1911, " 647, § 50, subd. 11, ¶ (b) *.....	322
1909, " 62, § 220.....	712	1911, " 647, § 53 *.....	322, 323
1909, " 62, § 220, subd. 7 (new)... 452-454, 709 710, 711, 713		1911, " 647, § 94 †.....	322, 323
1909, " 62, §§ 290-296, as amd.....	252	1911, " 647, § 185, subd. 1 †.	373
1909, " 62, § 290.....	252	1911, " 647, § 185, subd. 6 †.	372
1909, " 62, § 291.....	252, 253	1911, " 647, § 185, subd. 8 †.	373
1909, " 62, §§ 292-296, as amd.....	252	1911, " 732.....	712
1909, " 63, § 98, subd. 1... 322 323		1911, " 891.....	692
1909, " 64, § 341.....	293, 294	1912, " 318.....	372, 373
1909, " 219, § 62.....	937, 938	1912, " 328.....	557
1909, " 240.....	887	1912, " 368.....	929
1909, " 247.....	145	1912, " 420.....	435-437
1909, " 545, § 270.....	293, 294	1912, " 444.....	322
1910, " 126.....	541	1912, " 483.....	155
1910, " 352.....	169	1913, " 60.....	663
1910, " 422.....	832	1913, " 349.....	290, 307
1910, " 452.....	537-539	1913, " 508.....	372, 373
1910, " 480, § 66, subd. 2.. 937 938		1913, " 455.....	349
1910, " 480, § 66, subd. 4.. 841 842		1913, " 633.....	465, 466
1910, " 480, § 69.....	842	1913, " 723.....	322, 323
1910, " 481, § 83.....	326	1913, " 740... 289-291, 306-309	
1910, " 481, § 92.....	302	1913, " 744.....	302
1910, " 481, § 178.....	929	1913, " 765.....	389
1910, " 559.....	714, 715	1914, " 23.....	231, 232
1910, " 559, §§ 199, 209... 715		1914, " 41.. 32-34, 325, 343, 344 346-350, 352, 353, 386 387-390, 398, 399, 942 943, 945-947	
1910, " 559, § 383, subd. 2.. 715		1914, " 41, § 2.....	349
1910, " 659, arts. 2, 3.....	29	1914, " 41, § 2, group 8.. 387-389	
1910, " 659, art. 3A.....	29	1914, " 41, § 2, group 10... 351	
1910, " 659, § 43 (new)....	29	1914, " 41, § 2, group 15... 343 344	
1910, " 659, § 44 (new)... 28-31		1914, " 41, § 2, groups 29, 30. 348 349	
1910, " 659, § 95.....	29	1914, " 41, § 2, group 33... 348 349, 350	
1911, " 327.....	133	1914, " 41, § 2, group 34... 348 349	
1911, " 518, § 1.....	231, 232	1914, " 41, § 2, group 41... 236 237	
1911, " 571.....	422, 912		
1911, " 647.....	322, 372		

* See Laws of 1916, chap. 451.—[REF. † See Laws of 1912, chap. 444.—[REF.

‡ See Laws of 1912, chap. 318.—[REF.

SECTIONS OF CODE CIV. PROC. CITED. lxv

	PAGE.		PAGE.
1914, chap. 41, § 2, group 42....	344	1915, chap. 310.....	181
1914, " 41, § 3, subd. 4.....	237	1915, " 318.....	322
1914, " 41, § 3, subd. 5.....	344	1915, " 321.....	289, 306
1914, " 41, § 3, subd. 7.....	351	1915, " 327.....	832
	352, 353	1915, " 357.....	289, 306
1914, " 41, § 11.....	346	1915, " 386.....	797, 798
1914, " 41, § 15, subd. 3.....	320	1915, " 502.....	832
1914, " 41, § 20.....	398, 399	1915, " 531.....	28-31
1914, " 41, § 21.....	319	1915, " 537.....	155
1914, " 41, § 23.....	324	1915, " 648.....	289, 290, 306
1914, " 41, § 50.....	345-347	1915, " 650.....	290, 291, 307, 308
1914, " 41, §§ 51, 52.....	346	1915, " 664..	452-454, 709-711
1914, " 41, § 114.....	388, 390		713
1914, " 67.....	887	1916, " 87.....	692, 693
1914, " 153.....	322, 323	1916, " 127.....	658
1914, " 316.....	345-347	1916, " 323.....	709-711, 713
1914, " 363.....	832	1916, " 411.....	678, 679
1914, " 369, § 57 et seq.....	63	1916, " 451.....	322
1914, " 388..	289, 306, 308, 309	1916, " 497.....	510
1914, " 396.....	289, 290, 306	1916, " 503.....	510
1914, " 443.....	189	1916, " 507.....	101, 107
1914, " 457.....	435-437	1916, " 516.....	155
1914, " 470.....	510	1916, " 517.....	141
1914, " 507.....	912	1916, " 547.....	901
1915, " 167.....	398, 399	1916, " 622..	320, 324, 349, 350

SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.

	PAGE.		PAGE.
Code C. P. generally.....	484, 485	Code C. P. §§ 713, 716.....	643
§ 264.....	292-295	§ 829....	312, 449, 818
§ 274.....	294		820
§ 382..	230, 556, 557, 640	§ 830....	312, 313, 316
	641	§ 870.....	723
§ 382, subd. 5.....	640	§ 922.....	539
§ 395.....	736	§ 983.....	379, 380
§ 432.....	202-204	§ 983, subd. 2..	377-379
§ 432, subd. 1.....	204	§ 984.....	669
§ 452.....	253	§ 1022.....	746
§ 501.....	455, 457	§ 1279....	605, 631, 783
§ 532.....	34		787, 825
§ 537....	484-486, 489	§ 1294.....	485
§ 546.....	486, 489	§ 1317.....	944
§ 547.....	488	§ 1391.....	93, 94

lxvi SECTIONS OF PENAL LAW CITED.

	PAGE.		PAGE.
Code C. P. § 1628.....	933	Code C. P. § 2481, subd. 6 (old).....	191
..... § 1638 et seq.....	617	§ 2490, subd. 6	
§ 1674.....	676, 677	(new).....	191
§ 1676.....	655, 656	§ 2510 (new)...	187-191
§ 1723.....	482	§ 2510, subd. 1	
§ 1742.....	366, 367	(new).....	187-190
§ 1743.....	367	§ 2510, subds. 2-8	
§§ 1762-1767... 745, 747		(new).....	188, 189
§ 1762.....	745	§ 2541 (new).....	167
§ 1767.....	745-747	§ 2614 (new)...	187-191
§ 1776.....	113	§ 2623 (old)...	189, 190
§ 1780.....	663, 932	§ 2653a.....	440
§§ 1903, 1905.....	955	§ 2736 (new).....	189
§ 2120 et seq.....	252	§ 2891.....	234, 235
§§ 2129, 2133.....	253	§ 2936.....	234
§ 2137.....	252, 253	§ 2939.....	715

SECTIONS OF THE CODE OF CRIMINAL PROCEDURE CITED.

	PAGE.		PAGE.
Code Crim. Proc. pt. 4, tit. 3,		Code Crim. Proc. § 542.....	909
chap. 7. 30, 31		§ 887.....	923
§ 188 et seq... 30		§ 899, subd. 1. 436	
31		437	
§ 208..... 30, 31		§ 916.....	238
§ 485-a.....	661		

SECTIONS OF THE PENAL CODE CITED.

	PAGE.		PAGE.
Penal Code, §§ 316, 317.....	883	Penal Code, § 675.....	194
§ 642.....	853		

SECTIONS OF THE PENAL LAW CITED.

	PAGE.		PAGE.
Penal Law, § 43.....	194	Penal Law, § 553, subd. 3... 846-849	
§ 553.....	853, 854	853	
§ 553, subds. 1, 2... 853		§ 553, subds. 4-7... 853	

RULES CITED.

lxvii

PAGE.	PAGE.
Penal Law, § 580..... 279, 280	Penal Law, § 1141, subd. 1. 882, 883
§ 580, subd. 5..... 279	§ 1275..... 290, 307
§ 580, subd. 6. 279, 280	§ 1297..... 661
§ 720..... 193-196	§ 1343..... 849
§ 1141..... 882, 883	§ 2189..... 661, 662

STATUTES OF THE STATES AND TERRITORIES CITED.

PAGE.	PAGE.
Indiana.	New Jersey.
Revised Statutes (1881), § 2473. 266	Laws of 1911, chap. 95, ¶ 7.. 49
Revised Statutes (1914), § 2997. 266	Laws of 1911, chap. 95, ¶¶ 11,
Acts of 1907, chap. 206..... 832	12..... 49, 50
2 Burns' Anno. Ind. Stat.	Laws of 1911, chap. 95, ¶¶ 15,
(1914), 116, § 2997..... 266	18, 19..... 50
Massachusetts.	Laws of 1911, chap. 95, ¶ 20. 50
Transfer Tax Act..... 711	51
New Jersey.	Laws of 1911, chap. 95, ¶ 21.. 51
Laws of 1910, chap. 274, § 11. 365	Laws of 1913, chap. 174.... 48-53
366	Laws of 1914, chap. 244.... 48-53
Laws of 1911, chap. 95..... 48-53	

FOREIGN STATUTES CITED.

PAGE.
England.
43 Eliz., chap. 4, § 1..... 679

RULES CITED.

PAGE.	PAGE.
Ct. App. Rules, Attys. & Coun- sors at Law (1903), rule 2... 147	General Rules of Practice, rule
148-150	82..... 723
Ct. App. Rules, Attys. & Coun- sors at Law (1911), rule 2... 149	N. Y. Mun. Civ. Serv. Rules
150	(1907), rule XI, subd. 2.... 551
General Rules of Practice, rule 1. 149	Western Classification No. 53,
150	rule 9..... 785

MUNICIPAL ORDINANCES, ETC., CITED.

Buffalo.	PAGE.	New York City.	PAGE.
Ordinances, § 72.....	404, 412	Code of Ordinances (1915),	
Ordinances, § 73....	404-406, 412	chap. 24, art. 2, § 17.....	707
New Rochelle.			708
Sanitary Code.....	714, 715	Code of Ordinances (1915),	
New York City.		chap. 24, art. 2, § 17, subd.	
Mun. Civ. Serv. Rules (1907),		3.....	808, 809
rule XI, subd. 2.....	551	Sanitary Code, § 116....	826, 828
Speed Ord. Apr. 15, 1913, §§ 1,			829-832
4, as amd.....	175	Sanitary Code, § 117.....	826-832
Traffic Reg. Ord. Aug. 14,		Sanitary Code (1915), § 124..	28
1914.....	707, 708	Building Zone Resolution, July	
17 Ord. Res., etc., Bd. Ald.,		25, 1916.....	511-513, 515-517
etc. (1914), 298, 299, No.		Port Chester.	
460.....	707, 708	Colonial Charter of 1720.....	232

INTERSTATE COMMERCE RULES AND
REGULATIONS CITED.

	PAGE.		PAGE.
Uniform Bill of Lading, § 3....	786	Western Classification, No. 53,	
		rule 9.....	785

COLONIAL CHARTER CITED.

Port Chester.	PAGE.
Charter of 1720.....	223

Cases
DETERMINED IN THE
APPELLATE DIVISION
OF THE
SUPREME COURT
OF THE
State of New York.

In the Matter of the Application of JOHN O. BAKER, Appellant, for Payment of an Award Made for Damage Parcel No. 8 on the Damage Map and in the Report of the Commissioners of Estimate and Assessment in the Proceedings to Open Haven Avenue from Southerly Line of One Hundred Seventieth Street to a Point 464.31 feet Northerly Therefrom, in the Borough of Manhattan, City of New York.

THE CITY OF NEW YORK, Respondent.

First Department, May 4, 1917.

Eminent domain — municipal corporation — street opening, city of New York — amendment to charter allowing interest on awards to unknown owners is retroactive — claimant to such award entitled to interest although condemnation was instituted prior to amendment.

Chapter 466 of the Laws of 1901, which amended section 1002 of the charter of the city of New York relating to the condemnation of lands for street openings in said city, by providing that on default of payment of awards made to unknown owners the city shall remain liable for such awards deposited with it with "interest thereon from a day one year after the date upon which title vested in The City of New York to the person or persons who may thereafter be found entitled to the same," is retroactive and applicable to condemnation proceedings which were instituted before the amendment went into effect. Hence where a person established his right to an award made to unknown owners he is entitled to interest according to the terms of said amendment.

APPEAL by the petitioner, John O. Baker, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of January, 1917, as denies his motion for the payment of interest on the award herein.

Litchfield F. Moynahan, for the appellant.

Joel J. Squier, for the respondent City of New York.

SCOTT, J.:

Commissioners of estimate and assessment were appointed in this proceeding on May 8, 1899, and title to the land to be acquired vested in the city of New York on May 31, 1899, pursuant to a resolution of the board of public improvements. The report of the commissioners was confirmed on May 19, 1902, and included an award of \$445.50 to unknown owners of a plot known as damage parcel No. 8. It has been shown in this proceeding and is not questioned by the city that petitioner is entitled to be paid that award. The only question involved in this appeal is whether or not he is entitled to be paid interest thereon from the date of confirmation of the report. By the order appealed from he has been denied such interest.

There is no question involved here as to the allowance of interest on the appraised value of the land from the day on which title vested in the city, until the date of the confirmation of the report. It was the duty of the commissioners to include such interest in the award as part of the compensation to be paid to the owner (Greater N. Y. Charter [Laws of 1897, chap. 378], § 990), and we assume that they did so.

What the petitioner claims is interest from the date of confirmation by way of penalty for non-payment, and whether he is so entitled depends upon the determination as to what statute applies.

Section 1002 of the Greater New York charter of 1897, which was in force when this proceeding was instituted, provided that in cases of awards to unknown owners, or to certain other classes of owners it should "be lawful for the city to pay the sum or sums mentioned in the said report, payable, or that would be coming to such owners, proprietors, parties, and per-

App. Div.]

First Department, May, 1917.

sons, respectively, into the said Supreme Court, to be secured, disposed of, and invested as the said court shall direct, and such payment shall be as valid and effectual, in all respects, as if made to the said owners, proprietors, parties, and persons, respectively, themselves, according to their just rights, as if they had been known and had all been present, of full age, discreet, and *compos mentis*." Although this statute made it the duty of the city to pay these awards into court, no penalty or other consequence was provided in case of non-compliance and since there was no provision of statute imposing the payment of interest in such a case, the city could not be charged with interest by way of penalty for non-payment. The section was, however, amended by chapter 466 of the Laws of 1901, by modifying the phraseology and by adding to the provision above quoted the following: "and in default of such payment the said city of New York shall be and remain liable for the amount of the said sums of money with lawful interest thereon from a day one year after the date upon which title vested in The City of New York to the person or persons who may thereafter be found entitled to the same."

If the last quoted provision is applicable the city is liable for the interest on the award in this case from the date of the confirmation of the report because the title to the premises had vested in the city more than one year before such confirmation. We think that the amendment of 1901 is available to the petitioner notwithstanding the proceeding was instituted before that amendment was adopted. The payment of interest in such a case is imposed as a penalty for non-compliance with the statutory requirement that the award shall be paid into court, and the law applicable is that which is in force when the default occurs. (*Salter v. Utica & Black River R. R. Co.*, 86 N. Y. 401.) The case is not like those in which a condemnation proceeding had been commenced under the Consolidation Act, and concluded after the enactment of the Greater New York charter, in which it has been held that the payment of interest on awards was regulated by the provisions of the Consolidation Act. (See *Matter of Mayor [Cromwell Avenue]*, 96 App. Div. 424; *Matter of City of New York [E. 178th St.]*, 107 id. 22; *affd.*, 183 N. Y. 571.) Here the proceeding was

commenced and carried through to a conclusion under the same act. Our conclusion is that petitioner is entitled to interest on the award from the date of the confirmation of the commissioners' report, and the order appealed from will, therefore, be modified accordingly and as modified affirmed, with ten dollars costs and disbursements to the appellant.

CLARKE, P. J., SMITH, PAGE and DAVIS, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

THE NEW YORK TRUST COMPANY, as Trustee, under the Trust Agreement, Executed December 6, 1904, by HARRY S. BLACK and Others, Respondent, v. HARRY S. BLACK and Others, Defendants, Impleaded with NASSAU COUNTY TRUST COMPANY, Appellant.

First Department, May 4, 1917.

Trust—deed of trust with direction to pay income to use of infant—when duty of administering income devolves upon trustee rather than general guardian—trust for use of infant equivalent to use for support and maintenance.

Where the creator of a trust directed that at the death of a life beneficiary a portion of the corpus of the trust consisting of personal property should continue to be held by the trustee "the income thereof be applied to the use" of a certain infant until a specified date if he should live until that time and if not then so long as he shall live, the trustee has the duty and right of applying the income directly to the use of the infant and should not be required to pay it over as it accrues to the general guardian of the infant for administration.

Although the trust deed merely directed the trustee to apply the income "to the use" of the infant and did not state that it should be applied to his "support, education and maintenance," the two phrases mean the same thing and involve the same powers and duties.

PAGE and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the defendant, Nassau County Trust Company, from so much of a judgment of the Supreme Court in favor

App. Div.]

First Department, May, 1917.

of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of August, 1916, upon the report of a referee as directs plaintiff, as trustee, to retain in its hands certain accrued income upon a trust fund.

Henry A. Uterhart, for the appellant.

Richard G. Babbage, for the defendant Fuller.

George Richards, for the respondent.

SCOTT, J.:

This action is brought by plaintiff as trustee under a certain trust agreement for a settlement of its accounts. But a single question is presented by this appeal.

The trust agreement was executed by one Harry S. Black on December 6, 1904. By it he transferred to plaintiff, as trustee, certain valuable securities to hold the same, collect the interest and dividends thereon and to pay the same to one Allon Fuller Black until April 1, 1920, or, if she should die prior to that date, then until her death. Upon her death prior to that date, if Fuller Chenery (now known as George Allon Fuller) should then be living it was provided that one-third of said portion of said property should continue to be held in trust by said trustee "and the income thereof be applied to the use of said Fuller Chenery, until the first day of April, 1920, if he shall live until then, and if not, then so long as he shall live."

Fuller Chenery (now known as George Allon Fuller) is an infant of about eighteen years of age, and will come to full age on March 7, 1920. Allon Fuller Black died on October 10, 1915, and the trust provision in favor of the aforesaid infant became operative on that date. On December 11, 1915, the defendant and appellant, Nassau County Trust Company, was appointed by the surrogate of Nassau county the general guardian of said Fuller Chenery, now known as George Allon Fuller.

The plaintiff's account as trustee shows that it held a substantial amount of securities subject to the aforesaid trust in favor of said infant, and the contention of said Nassau County Trust Company is that the income from said trust fund should be paid over to it, as it accrues, as general guardian. The plaintiff's contention is that under the terms of the trust deed

it is its duty and right to apply said income directly to the use of said infant. This is also the view of the guardian *ad litem* of the infant. No doubt is suggested by any one as to the responsibility of either trust company, and the only practical question involved in the controversy appears to be whether the income of the fund shall be subjected to the payment of one or two sets of commissions.

We are referred by counsel to two cases which, if hastily read, would seem to be in conflict. They are *Gasquet v. Pollock* (1 App. Div. 512; *affd.* on opinion below, 158 N. Y. 734), and *Matter of McCormick* (40 App. Div. 73). Upon a careful reading, however, the cases may easily be reconciled. In *Gasquet v. Pollock* it appears that one Eveline G. Marshall had, by will, divided her estate between three daughters. To two of them she left shares outright. The share of the third daughter, Marie Marshall, she gave to her executors in trust to collect and receive the income and to apply the same to the use of her said daughter Marie. Some years after her mother's death, and after she herself had become of age, Marie Marshall was judicially declared to be incompetent and a committee of her person and estate was appointed. The income from the trust fund greatly exceeded what was necessary for the support and maintenance of the incompetent, and the question arose whether the surplus income should be paid over to the committee, or whether the trustees should retain and accumulate it. It was held that the committee, in right of the daughter, was entitled to receive the surplus income because the effect of the will was to give the whole income to the daughter and hence that so much of it as it was not necessary to apply for her benefit, was her property freed from the trust provision. The court said: "If the daughter was of sound mind she would be entitled to have the income applied to her use by having it paid over to her as it accrues. Being of unsound mind, she is represented by her committee, who is entitled to have the accumulated income paid over to him." The opinion did not deal with or deny the right of the trustees to make the application to the use of the incompetent of so much of the income as might be necessary for her support and maintenance. It dealt only with the accumulated surplus income.

Matter of McCormick (supra) much more closely resembles the case with which we have to deal, because it involved a trust for the benefit of an infant. In that case one Eliot McCormick had by will given a share of his estate to two trustees for the benefit of a child with instructions to apply the net income to the support, education and maintenance of said child during infancy, and to pay over the principal to her when she came of age. He appointed his wife and the two trustees to be the child's guardian. Those three as guardians applied to the surrogate for an order authorizing the application for the support and education of the infant of a sum considerably less than the income from the trust fund, thus providing for the accumulation of a surplus. Such an order was made. Later the mother of the child claiming to be its sole guardian, as under the statute she was entitled to claim (See *Matter of Kellogg*, 187 N. Y. 355, 358), demanded that the whole accumulated income be paid over to her, and that thereafter the income as it accrued should be paid over to her. There she raised the same question which the appellant raises here. The court denied her application as to the accumulated income and the surplus thereafter to arise, holding that it was the right and duty of the trustees to apply to the use of the infant only so much of the income as was proper and necessary for her support, education and maintenance, holding the surplus, if any, to meet the growing needs of the infant or for such purposes as might thereafter justify its expenditures.

The distinction between the cases, as it seems to me is this that in the *Gasquet* case the surplus income became the absolute property of the adult *cestui que trust* and could not therefore be held under the trust, while in the *McCormick* case, as in this, the income never became the absolute property of the infant, but remained until her majority subject to the provisions of the instrument creating the trust, and trust funds of which the trustees retained the legal title. As the general guardian of an infant is entitled to receive only the property which belongs to the infant, it is not entitled to receive anything whether principal or income which belongs to the trustees.

That the plaintiff as trustee under the trust agreement is entitled, as between itself and the general guardian, to make

application of the income to the use of the infant is, I think clear, under the authorities. (*Fullerton v. Jackson*, 5 Johns. Ch. 278; *Jarvis v. Babcock*, 5 Barb. 139; *Leggett v. Perkins*, 2 N. Y. 297.) In the case last cited Judge BRONSON said: "Where the words of the statute are followed, and the trust is to receive and apply rents and profits, I have never yet met with any judge or lawyer who denied that the trustee had authority to make the application of the trust money." In the same case Judge GARDINER said: "It is believed that in all cases, before and since the statute, the rule is uniform, that the creator of the trust may direct specifically the performance of those things which the trustee, whose authority is derived from him, might himself perform, in the lawful execution of the trust, if no specific directions were given."

The true rule, as I conceive it, as to the duty of a trustee in a case like the present is thus stated in *Perry on Trustees* (Vol. 2, § 622): "It is the duty of trustees to accumulate all the income of a trust for infants which is not employed in maintenance and education, as before stated, whether a direction for such accumulation is contained in the instrument of trust or not."

The distinction I have endeavored to make clear was well expressed by Surrogate KETCHAM in *Matter of Connolly* (71 Misc. Rep. 389) as follows: "Where a testamentary trustee is imperatively directed to pay income to an infant, it should be paid in full to the general guardian, who in turn may apply it to the maintenance and education of his ward under the order of the court.

"But where the trustee is required to exercise his discretion as to the use of the income, the gift to the child is only of so much of the income as the trustee shall properly determine to apply, and it is not for either the guardian or the court to interfere with the function of the trustee, unless it appear that he is exercising it perversely or unreasonably." I attach no significance to the fact that the trust deed in the present case merely directs the trustee to apply the income "to the use" of the infant, and not to his "support, education and maintenance." The two phrases mean practically the same thing, the expression used in the present trust deed being, if

App. Div.]

First Department, May, 1917.

anything, the more comprehensive. That deed follows the language of the statute relating to real estate trusts. By the Revised Statutes (1 R. S. 728, § 55, subd. 3) such trusts were authorized for the "education and support, or either," of a beneficiary, but by Laws of 1830, chapter 320, section 10, that phrase was changed to the present form.* It has never, so far as I am aware, been considered that the change restricted or substantially altered the powers and duties of a trustee under such a trust.

In the present case the creator of the trust, who had a right to direct how the trust should be executed, designated plaintiff as the one to apply the income to the use of the infant *cestui qui trust*, and so long as the trustee retains its office it is its right and duty to comply with this direction.

The judgment appealed from should be affirmed, with costs to the plaintiff and the guardian *ad litem* payable out of the trust fund.

CLARKE, P. J., and SMITH, J., concurred; LAUGHLIN and PAGE, JJ., dissented.

PAGE, J. (dissenting):

The question involved in this appeal is whether under the provision of the deed it is the duty of the trustee to pay over the entire income of the trust fund created for the benefit of the infant to the general guardian, leaving the discretion as to what portion thereof shall be expended for the use of the infant in the guardian, or whether the discretion is reposed in the trustee by virtue of the deed to determine what portion shall be applied to the use of the said infant, in which case the trustee cannot be compelled to pay the entire income to the general guardian.

The majority of this court have determined that it was the intention of the grantor, as expressed in the deed of trust, that the discretion as to what portion of the income shall be "applied" to the use of the infant is reposed in the trustee, whose duty it is to attend personally to the expenditure of the

* See Real Prop. Law (Gen. Laws, chap. 46; Laws of 1896, chap. 547), § 76, subd. 3; now Real Prop. Law (Consol. Laws, chap. 50; Laws of 1909, chap. 52), § 96, subd. 3.—[REP.]

income and to the care of the infant. It has been repeatedly held that where a deed or will creating a trust has required a trustee to "apply" the income from trust funds "to the education and support of an infant" it becomes the duty of the trustee to make a personal application of the funds to the infant's needs for those specific purposes and to hold the accumulated surplus. The majority of the court rely upon one of these cases. (*Matter of McCormick*, 40 App. Div. 73; *affd.* without opinion, 163 N. Y. 551.) It seems to me, however, that the language of the instruments involved in these cases is clearly distinguishable from the language of the present deed of trust, in that, whereas in the cases relied upon there is an express direction for the trustee to apply the income for a specific purpose, namely, the education and support of the infant, in the case at bar the direction is merely a general one to apply the income to the use of the infant. The Court of Appeals has held in cases dissimilar in their facts to the case at bar that a direction to receive the income from trust property and pay it over to a beneficiary is equivalent to a direction to apply the income to the use of a beneficiary within the meaning of the Revised Statutes authorizing express trusts; or, in other words, that the two expressions are synonymous in their meaning. (*Moore v. Hegeman*, 72 N. Y. 376; *Leggett v. Perkins*, 2 *id.* 297. See 1 R. S. 728, § 55, subd. 3, as *amd.* by Laws of 1830, chap. 320, § 10; now Real Prop. Law [Gen. Laws, chap. 46; Laws of 1896, chap. 547], § 76, subd. 3; Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 96, subd. 3.) Following these cases it has been held by this court in the case of *Gasquet v. Pollock* (1 App. Div. 512; *affd.* on opinion below, 158 N. Y. 734) that a direction to a trustee to receive the interest, income and profits of a share of an estate and to "apply the same to the use" of the testatrix's daughter during her life was equivalent to a direction to pay over the entire income thereof to the daughter, and reposed no discretion in the trustee as to how the income should be expended. The court there said (at p. 513): "There was no discretion given the trustees to apply to her use a part only of the income, nor as much as her needs required, nor as much as, in the judgment of the trustees, she needed. The whole income was given to the daughter and she is entitled to

App. Div.]

First Department, May, 1917.

have it all. The fair construction of the language used in the will is that the income shall be paid over as it accrues to the daughter."

The court proceeded to hold that as the daughter was of unsound mind and was represented by a committee of her person and property, the committee was entitled to have the income paid over to him. That case, it seems to me, is not distinguishable in principle from the case at bar. The language of the will is almost identical in its terms with the language of the present deed of trust, and the fact that the beneficiary in that case was an adult of unsound mind represented by a committee, whereas in the present case the beneficiary is an infant represented by a guardian, does not seem to me a valid ground of distinction. The real question was whether the direction to "apply the [income] to the use" of the beneficiary required the trustees to pay over the entire income and left no discretion in the trustees as to how it should be applied. The status of the beneficiary has no bearing upon the meaning of the language, and the rule would apply as well to an infant as to an adult beneficiary. If the infant in the case at bar were of full age he would clearly be entitled to receive all of the income from the trustee, and being represented by his guardian, the guardian is entitled to receive the income and to apply it to the use of the infant in its discretion.

I think there is no force in the respondent's contention that the grantor, in selecting the trustee, must of necessity have intended that the trustee should use its discretion both as to the investment and care of the trust fund and of the maintenance and care of the infant. Trustees are generally selected with a view to their ability in caring for and investing the trust property, and the qualifications which would fit a trustee for such a duty would not of necessity also fit him for the duty of guiding the destinies and shaping the life of an infant. Where these additional burdens are imposed upon the trustee it is customary for the instrument creating the trust expressly so to provide either by a direction to apply the income to the education, etc., of the beneficiary or by some other specific injunction with respect to how the money is to be applied. There is, in my opinion, no reason for imposing such duties

upon the trustee merely by virtue of a general direction to apply the income to the use of the beneficiary.

I think the decree should be modified in accordance with the foregoing.

LAUGHLIN, J., concurred.

Judgment affirmed, with costs to plaintiff and guardian payable out of the fund.

GEORGE H. DIEHL, JR., Appellant, v. AMALIE MATHILDE BECKER, as Executrix, etc., of ERNEST GUSTAV HOFFMANN, Deceased, Defendant, Impleaded with ALFRED W. KIDDLE, as Executor, etc., of ERNEST GUSTAV HOFFMANN, Deceased, Respondent.

First Department, May 4, 1917.

Loan — usury — agreement which makes payment of usury optional with borrower — agreement to give bonus in addition to legal interest on sale of patent rights.

A loan is not usurious where it leaves the question of payment of a sum in excess of legal interest optional with the borrower upon a condition which it is within his power not to perform.

Thus, an agreement by a borrower of a certain sum of money to pay legal interest thereon until the debt is paid, with an agreement to pay an additional bonus of \$1,250 if he is able to sell or license certain patent rights within six months, or to pay a bonus of \$2,500 if he should sell or license the patent rights at any time after six months, is not usurious, for the borrower does not bind himself to make the sale or give the license and hence it is optional with him whether he will pay usury.

SMITH and PAGE, JJ., dissented, with opinions.

APPEAL by the plaintiff, George H. Diehl, Jr., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of October, 1916, granting respondent's motion for judgment on the pleadings consisting of a complaint and answer, and also from the judgment entered in said clerk's office on the 19th day of October, 1916, pursuant to said order.

John Kenneth Byard, for the appellant.

Albert Handy, for the respondent.

App. Div.]

First Department, May, 1917.

SCOTT, J.:

The action is brought to recover a loan of \$5,000 made by plaintiff to Ernest Gustav Hoffmann, now deceased, whose executor, the respondent, has interposed an answer to the complaint and thereupon moved for judgment on the pleadings. The complaint sets forth at length the agreement under which this loan was made, and the contention of the respondent is that this document shows upon its face that the loan was usurious. The paper read as follows:

"MR. GEORGE H. DIEHL, JR.,

"New York City:

"MY DEAR SIR.—If you will loan me the sum of Five thousand Dollars (\$5,000) I will secure to you the payment of that amount out of the net proceeds realized by me from the sale or other disposition of the following inventions of mine or from the granting of any rights or licenses thereunder or under any Letters Patent of the United States that may be granted therefor, viz:

"Application for U. S. Letters Patent, Ser. No. 379,683, filed June 19, 1907, Universal Joints. Application for U. S. Letters Patent, Ser. No. 394,602, filed September 26, 1907, Motor Vehicles.

"Application for U. S. Letters Patent, Ser. No. 405,686, filed December 9, 1907, Transmission. Gearing for Automobiles.

"I also agree that if any such sale or license be made within six months from the date hereof to pay to you out of the net proceeds derived therefrom as and when received by me the said sum of \$5,000 with interest thereon up to the time of payment at the rate of 6% per annum together with the further sum of \$1,250, provided the whole of said sums are thus paid within such period of six months.

"I also agree that if any such sale or license be made at any time after six months from the date hereof, to pay to you out of the net proceeds derived therefrom as and when received by me, the said sum of \$5,000 with interest thereon up to the time of payment, at the rate of 6% per annum together with the further sum of \$2,500.

"Of course it is to be understood between us that I retain the sole right for the term of five years from the date hereof to sell the above inventions and applications and any Letters Patent of

the United States that may be granted therefor or to grant rights or licenses under the above mentioned applications or under any Letters Patent of the United States that may be granted therefor on such terms as I see fit notwithstanding this letter, but I hereby agree to notify you when I shall have made any such sale or license.

"I, however, agree that if I make any sale of the above mentioned inventions or Letters Patent therefor, instead of granting any rights or licenses thereunder, that I will not sell the same for less than the sum of \$10,000. On the other hand if I grant any rights or licenses under the above mentioned inventions or under any Letters Patent therefor then the net amount of royalties which I may receive therefrom shall be paid over by me to you from time to time until the whole of the above mentioned sums have been fully paid to you.

"It is also understood that I am to pay to you semi-annually the interest at 6% per annum on the above mentioned sum of \$5,000 until said sum is fully paid; and of course I have the right to pay off the whole or any part of said sum of \$5,000 with the accrued interest at any time after the date hereof, but if I do so you will nevertheless be entitled to receive the sum of \$1,250 or the sum of \$2,500 in addition depending upon whether I make any sale or other disposition of the above inventions or of any Letters Patent therefor within six months from the date hereof or after that period as above set forth.

"Yours very truly,

"E. G. HOFFMANN."

We are of the opinion that the document in question does not evidence a usurious agreement because it leaves the question of payment of a sum in excess of legal interest optional with the borrower upon a condition which it was within his power not to perform. (*Sumner v. People*, 29 N. Y. 337.) As was said in that case: "To constitute usury there must be either a payment or an agreement by which the party taking it is entitled to receive more than seven per cent. If the payment is conditional, and that condition is within the power of the debtor to perform, so that the creditor may by the debtor's act be deprived of any extra payment, it would not be

App. Div.]

First Department, May, 1917.

usurious." This rule has been recognized in many cases, and is well established. The only doubt that arises in any case, as it has arisen in this, is whether the rule is applicable to the facts.

In the case cited the agreement was such that the borrower by fulfilling the conditions relieves himself from the payment of the usurious interest. The present case presents the converse of that. The borrower does not agree to pay more than legal interest unless he shall make a sale of or issue a license under the patents referred to. He did not agree to do either, and was under no obligation to do so. Neither could the lender compel him to make such a sale or license. So that the question whether or not any sum, beyond legal interest should be paid was dependent entirely upon the will of the borrower, and unless he elected to make a sale or license, such payment could not be enforced by the lender. This as it seems to us, brings the case squarely within the rule above cited.

That the borrower undertook to repay the loan in any event seems to be clearly indicated by the language of the document referred to. He characterizes the transaction as a loan, agrees to pay lawful interest on it semi-annually, and reserves the right to pay it off at any time. It is only the payment of the bonus that is made conditional upon a sale or license. Of course it is probable that when the money was borrowed the borrower expected, and even hoped, to make a sale or a license. But that, even if true, is not the determinative factor in the case. The point is that he reserved to himself entire liberty of action, might sell or license or not as he saw fit, and could not be compelled to do either. It rested solely with him and not with the lender to fulfill or refuse to fulfill the condition upon which the bonus was to be paid.

The judgment and order appealed from must be reversed, with costs, and motion denied, with ten dollars costs.

CLARKE, P. J., and DAVIS, J., concurred; SMITH and PAGE, JJ., dissented.

SMITH, J. (dissenting):

As I read the contract the prevailing opinion ignores the right of the lender to foreclose the lien given to him upon the

patents as security for the amounts payable. This right is emphasized by that provision of the contract which retains in the borrower the sole right for five years to sell or grant licenses under the patents. Without this provision, except for the illegality of the contract, the lender might after a reasonable time have foreclosed his lien and sold the patents thereunder. This he may now do, as the five years have expired. I do not agree, therefore, with the prevailing opinion that it was optional with the borrower whether he would sell and pay the bonus. There breathes through the whole contract the manifest intention that the lender was to have the right to have returned the principal and interest, and in addition the bonus of \$1,250 or \$2,500, dependent upon the date of sale. That sale could within five years have been made by the borrower, or after that time by the lender through a foreclosure of his lien. If this be the true interpretation of the contract the lender cannot purge it of its illegality by bringing an action only for the principal and legal interest.

I recommend affirmance.

PAGE, J. (dissenting):

I cannot concur in the construction of the agreement of the parties that the additional benefit to accrue to the lender pursuant to the contract was not one which must necessarily accrue to him in any event, but was contingent upon the will of the borrower, and hence the contract was not usurious. (*Sumner v. People*, 29 N. Y. 337.) An examination of the letter quoted in full in the prevailing opinion clearly shows that at no time could the borrower repay the obligation pursuant to its terms without also paying in addition to the legal rate of interest either a bonus of \$1,250 or a bonus of \$2,500, depending upon whether the payment was made within six months or thereafter, and, therefore, though the borrower had some discretion as to which bonus he should be compelled to pay, he was compelled to pay a bonus of some amount in any event. The agreement is, therefore, clearly usurious, and the motion for judgment on the pleadings was properly granted.

Judgment and order reversed, with costs, and motion denied, with ten dollars costs.

MORO DE MORO, Appellant, v. SAMUEL P. TULL and 51-53
MAIDEN LANE, INC., Respondents, Impleaded with Others,
Defendants.

First Department, May 18, 1917.

**Practice — demurrer to counterclaim — inadvertent failure to renew
demurrer to same counterclaim in amended answer — motion to
open default granted.**

Where, in an action for foreclosure, the plaintiff demurred to a counterclaim and thereafter the defendant served an amended answer containing the same identical counterclaim, and the plaintiff inadvertently omitted to renew the demurrer until his time had elapsed by a few days, he should be allowed to open his default, and, on such a motion, the sufficiency of the counterclaim should not be definitely passed upon.

APPEAL by the plaintiff, Moro de Moro, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of December, 1916, denying his motion to open a default and for leave to serve a demurrer.

Elwood J. Harlam, for the appellant.

Sidney Lowenthal, for the respondent.

SCOTT, J.:

This is an ordinary foreclosure action. It was begun in July, 1916. Defendant Tull answered, pleading among other things a counterclaim for damages for the breach of an alleged verbal contract by plaintiff to remove an incumbrance upon another piece of property conveyed by plaintiff to Tull. This answer was served August 28, 1916, and on September 18, 1916, plaintiff demurred to the counterclaim. On October 13, 1916, Tull served an amended answer which contained the identical counterclaim as that contained in the first answer. Plaintiff inadvertently omitted to renew the demurrer, and the argument on the original answer and demurrer came up to be heard on November tenth. Defendant then raised the point that the amended answer had superseded the original

answer and consequently that there was nothing before the court.

Plaintiff's time to demur to the amended answer had by this time elapsed by a few days. He moved to open his default but his motion was denied, without prejudice to a renewal. He renewed the motion, which was again denied, with ten dollars costs, with leave to renew upon an affidavit of merits and a showing of merits. He paid the costs and again renewed the motion supplying the affidavit of merits, by the affidavit of the attorney and an explanation why the affidavit was not made by the plaintiff who is in England. On each of these motions the proposed demurrer was submitted. The last motion was denied because the court was of the opinion that there was no merit in the demurrer. Plaintiff was, however, permitted to renew for the purpose of serving a reply, and satisfying the court that it was meritorious. Plaintiff now appeals because he does not wish to reply but does wish to be in a position to attack the sufficiency of the counterclaim by demurrer.

Under the circumstances the motion should have been granted. The default was clearly inadvertent and was not serious. There is no reason why plaintiff should not be permitted to plead as he wishes, and certainly the sufficiency of the counterclaim should not be definitely passed upon on a mere motion to open a default.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted.

CLARKE, P. J., LAUGHLIN and DAVIS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted.

App. Div.]

First Department, May, 1917.

THE FIFTH AVENUE BUILDING COMPANY, Appellant, v. J. FREDERIC KERNOCHAN, as Executor, etc., of EDWARD M. KNOX, Deceased, Respondent.

First Department, May 18, 1917.

Landlord and tenant — action for rent — counterclaim — breach of covenant of quiet enjoyment — partial eviction — taking of vault space by city of New York — when covenant of quiet enjoyment implied — Real Property Law of 1896, section 216, construed.

In an action to recover rent under a lease containing no express covenant of quiet enjoyment, the defendant may, by counterclaim, recover damages for the breach of such a covenant which will be implied, caused by his partial eviction from the premises by the city of New York taking possession of a portion of the vault space occupied by the tenant in connection with the leased premises.

The rule under the Revised Statutes that a covenant for quiet enjoyment is implied in every lease and is broken when the tenant is evicted from part of the premises, either by the lessor or by a third party having paramount title, is not affected by section 216 of the Real Property Law of 1896 (section 251 of the present law), providing that "a covenant is not implied in a conveyance of real property whether the conveyance contains any special covenant or not."

Said statute is strictly limited to "a conveyance of real property" and does not include a conveyance of a leasehold or interest, because such an estate or interest is not included in the term "real property" as defined by section 1 of the Real Property Law of 1896.

The definition of real property in the article of the Real Property Law of 1896, dealing with the recording of instruments, is expressly confined to said article and is not applicable to section 216.

APPEAL by the plaintiff, The Fifth Avenue Building Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of February, 1917, overruling its demurrer to certain defenses and counterclaims in the amended answer.

William Greenough, for the appellant.

John Burlinson Coleman, for the respondent.

SCOTT, J.:

The action is for rent for the months of January to November, 1916, inclusive, of a store and basement in plaintiff's building

in the city of New York. The lease was made to defendant's testator and in terms included as a part of the demised premises a vault under the sidewalk in front of the premises. This vault was maintained under a revocable license from the city of New York, the title being in the city. About April, 1914, it became necessary to use the space occupied by this vault for the purpose of building the new subway, whereupon the city by its proper representatives revoked the license for the maintenance of this vault, and built a wall at the building line cutting the whole vault off from the building and depriving the lessee of its use. He was kept out of possession thereof continuously until May 23, 1916, when the said wall was moved out fourteen feet towards the curb, so that from April 29, 1914, to May 23, 1916, the lessee was wholly excluded from the use and enjoyment of the vault space, and since May 23, 1916, has been so excluded from a part thereof. These facts are set up in detail in the defenses demurred to wherein defendant demands the damages caused by his partial eviction from the demised premises.

The facts thus pleaded bring the case squarely within the recent decisions of this court in *Times Square Improvement Co., Inc., v. Fleischmann Vienna Model Bakery, Inc.* (173 App. Div. 633) and *Hoffman v. Murray* (N. Y. L. J., March 27, 1913; *affd.* without opinion, 159 App. Div. 904; 216 N. Y. 750), which are decisive of the present appeal unless a point now urged upon us by the appellant, and which was not presented in either of the cited cases, should, upon examination, prove to require a different ruling.

The lease in the *Times Square Improvement Co.* case contained a covenant of quiet enjoyment, and it was because the exclusion of the tenant from the vault space, which we found to be included in the lease, violated this covenant that it was held that damages were recoverable. The lease in the present case does not contain, in terms, a covenant of quiet enjoyment, but the defendant rests his case upon the proposition that such a covenant is implied in every lease of real property, and must, therefore, be read into this lease.

It has been a rule of law from time out of mind, and was frequently declared in this State in cases arising under the

App. Div.]

First Department, May, 1917.

Revised Statutes, that a covenant for quiet enjoyment is implied in every lease, and that the covenant is broken when the tenant is evicted from part of the premises either by the lessor or by a third party having paramount title. (*Mayor, etc., v. Mabie*, 13 N. Y. 151; *Mack v. Patchin*, 43 id. 167.)

The plaintiff does not question that this was the law under the Revised Statutes, but argues that under the Real Property Law of 1896 (Gen. Laws, chap. 46; Laws of 1896, chap. 547) and under the present Real Property Law (Consol. Laws, chap. 50; Laws of 1909, chap. 52) no such covenant can longer be implied.

The lease under consideration was made in December, 1908, and must, therefore, be construed in the light of the Real Property Law of 1896. The plaintiff's contention is based upon section 216 of that act which provides that "A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not." This same section, in slightly different form, was also contained in the Revised Statutes (1 R. S. 738, § 140), but was held not to be applicable to leases because while a lease was a conveyance within the meaning of the Recording Act, the estate which it conveyed was not, technically speaking, real estate but a chattel real.

The general definition of real property as given in the act of 1896 is to be found in its first section which provides that "The terms 'real property' and 'lands' as used in this chapter are coextensive in meaning with lands, tenements and hereditaments." As pointed out by Judge DENIO in *Mayor, etc., v. Mabie* (*supra*) a leasehold is neither lands, tenements nor hereditaments and is not, therefore, real property within the meaning of the foregoing definition. The plaintiff places its reliance upon section 205 which defines the term "conveyance" as follows: "The term 'conveyance,' as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered. * * * The terms 'estate' and 'interest in real property,' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent,"

and argues that the word "conveyance" in section 216 (quoted above), forbidding the implication of covenants, must of necessity relate to any conveyance such as is defined in section 205. This argument fails to note the care with which the draftsman of the Real Property Law of 1896 chose his words. It is true that he so framed section 205 that a lease would fall under the definition of a conveyance because it creates an interest in real property, and that the definition of the words "estate," and "interest in real property" includes a lease, which is a chattel real. But when it came to drawing section 216, forbidding the implication of covenants, more restricted language is used. That section did not provide that no covenant should be implied in any conveyance, or in any conveyance of an estate or interest in real property. The prohibition was strictly limited to certain conveyances, to wit, a conveyance of real property, which as already said did not include a conveyance of a leasehold estate or interest, because such an estate or interest is not included in the definition of the term "real property." As Judge DENIO remarked, in speaking of the Revised Statutes: "The Legislature was dealing with terms of art, and is presumed to have used them in their technical sense." (*Mayor, etc., v. Mabie, supra*, 159.)

It is true that in a subsequent article of the Real Property Law of 1896, dealing with the recording of instruments affecting real property, there is in section 240 of that act (as amd. by Laws of 1905, chap. 449) a definition of the term "real property" which is broader than that contained in the first section of the act, and which does specifically include chattels real except a lease for a term not exceeding three years. That definition is, however, expressly limited to the words "real property" as used in that article 8, and has no bearing upon the question we are now called upon to consider.

The plaintiff has fallen into the same error in construing the statute of 1896 that the former Supreme Court fell into in *Kinney v. Watts* (14 Wend. 38) and which was pointed out in *Tone v. Brace* (Clarke Ch. 503; 11 Paige, 566), and later in *Mayor, etc., v. Mabie (supra)*.

The order appealed from is, therefore, affirmed with ten dollars costs and disbursements, with leave to plaintiff to withdraw

App. Div.]

First Department, May, 1917.

the demurrer and reply within twenty days upon payment of said costs and disbursements and the costs awarded by the order appealed from.

CLARKE, P. J. LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to plaintiff to withdraw demurrer and to reply on payment of costs.

In the Matter of the Judicial Settlement of the Accounts of AARON P. GARRABRANT, Sole Surviving Executor and Trustee in the State of New York, and ANNIS E. CLARK, as Executrix, etc., of LAURA A. KLUGH, a Deceased Executrix and Trustee, etc., of HENRY E. KLUGH, Deceased.

AARON P. GARRABRANT, as Executor, and ANNIS E. CLARK, as Executrix, etc., Appellants; AARON D. KLUGH and Others, Respondents.

First Department, May 18, 1917.

Executors and administrators — appeal — practice on appeal from order of Surrogate's Court settling accounts — liability of executor for interest on sums due legatees.

Where the Appellate Division on appeal from an order of the Surrogate's Court settling the accounts of an executor and executrix and directing distribution of the estate, modifies the decree appealed from but does not in terms remit the matter to the Surrogate's Court for the entry of an order in accordance with its decision, it is not necessary for said court to enter a decree "resettling" its former decree. All that is necessary is to enter an order making the order of the Appellate Division the order of the Surrogate's Court; then the original decree will stand as modified.

Where on such an appeal the sums allowed to the appellants are increased so as to decrease the amounts due to the several distributees, it is proper, although not strictly necessary, to draw the order entered upon the remittitur from this court so as to specify the altered amount to be paid to each distributee.

The executor and executrix in such case being justified in declining to pay the legatees the sums fixed by the original decree, are liable only for the amount of interest earned upon the sums due to the several distributees from the date of the original decree to the date of the pay-

ment. This because a debtor is not chargeable with interest as a penalty for non-payment, unless the amount he is to pay is fixed or is ascertainable by computations from fixed factors.

If, however, the appeal had not been successful, and the amounts payable to the legatees had not been reduced in consequence thereof, the executor and executrix would have been chargeable with full interest from the date of the original decree.

APPEAL by Aaron P. Garrabrant, as executor, and another, from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 21st day of March, 1917, denying a motion to vacate an order resetting the decree herein entered upon the final settlement of the accounts of the executor and executrix.

Charles P. Hallock, for the appellants.

Charles E. Thorn, for the respondents.

SCOTT, J.:

The appellants, as executor and executrix of the last will and testament of Laura A. Klugh, deceased, presented their accounts to the Surrogate's Court for final settlement. A reference was ordered, and on the coming in of the referee's report a final decree was made stating and settling the accounts and directing a distribution of the amount found to be in the hands of the accountants subject to distribution. The accountants, being dissatisfied with the decree as entered, appealed to this court where the decree was modified by allowing to the accountants certain charges which the surrogate had refused to allow. (See *Matter of Garrabrant*, 176 App. Div. 186; *Matter of Klugh*, Id. 187.) Thereupon an order was entered in the Surrogate's Court making the order of this court the order of said Surrogate's Court, and fixing the amount of costs payable to the parties to the appeal. This order was entered on January 31, 1917, and on February 1, 1917, a decree was entered in the Surrogate's Court "resetting" the former decree of that court, dated March 20, 1916, which had originally settled the accounts. The accountants moved to vacate this resettled decree, and from an order denying their motion they appealed to this court.

The order of this court did not, in terms, remit the matter

App. Div.]

First Department, May, 1917.

to the Surrogate's Court for the entry of an order in accordance with our decision, but itself modified the decree appealed from. All that was necessary, therefore, to be done in the Surrogate's Court was to enter the formal order that was entered making the order of this court the order of the Surrogate's Court, and fixing the costs payable to the parties to the appeal which had been allowed by the order of this court. The original decree would then have stood as so modified. The increased sums allowed to the accountants by the order of this court decreased the various sums directed to be paid to the several distributees, and it would have been proper and convenient, although not perhaps strictly necessary, to have so drawn the order entered upon the remittitur from this court, as to specify the altered amount to be paid to each distributee. This, however, is not what the resettled decree did. It made no reference whatever to the order of this court, but purported to resettle and amend the original decision, modifying the figures, however, so as to correspond with the modifications resulting from our order. This was an irregular way to arrive at the result, but we cannot see that, in this case, any one can suffer from the irregularity. We refer to it only because in another case the practice here followed might lead to more serious results.

There is only one practical question raised by this appeal which requires consideration. By the resettled decree the accountants are charged legal interest upon the sums due to the several distributees from March 20, 1916, the date of the original decree, to the date of the payment. It is not disputed that this interest greatly exceeded the interest which the money had actually earned in the hands of the accountants.

By the original decree the accountants were found to have in their hands for distribution among the legatees the sum of \$9,762.54, which was required to be divided into nineteenthths, the amount payable to each legatee being specifically set forth in the decree. By the resettled decree the accountants were found to have in their hands for distribution among the legatees only \$8,774.32, and the amount to be paid to each legatee was proportionately reduced. It is on these reduced amounts that the accountants have been charged full legal interest of six per cent. This was error. Interest upon a sum directed to be paid

by a decree settling accounts of an executor or trustee is charged by way of a penalty for non-payment. But a debtor is not chargeable with interest as a penalty for non-payment unless the amount he is to pay is fixed or else is ascertainable by computations from fixed factors. In the present case the accountants were justified in declining to pay the legatees the sum fixed by the original decree, because, as the event has proved, these sums were too large. How much should be paid could not be determined until the appeal from the original decree had been heard and decided, nor were they called upon to pay the legacies in installments, or to make payments on account. Until the decree had been put in such form that it correctly fixed the several amounts which they were called upon to pay, they were not put in default for non-payment so as to be subject to the payment of full interest by way of penalty.

Of course if they had been unsuccessful in their appeal to the court and the amounts payable to the legatees had not been reduced in consequence thereof, they would have been chargeable with full interest from the date of the original decree. (*Matter of Ryer*, 120 App. Div. 154.)

We see no necessity for vacating the resettled decree, but under the prayer for "other and further relief" in appellants notice of motion the resettled decree will be amended by striking out the words "with interest thereon at the rate of six per centum per annum from March 20, 1916, the date of entry of the original decree herein" whenever they appear, and insert in place thereof the words: "with such interest as the accountants have realized thereon," with ten dollars costs and disbursements to appellants to be deducted proportionately from the amounts payable to the respondents.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, J.J., concurred.

Order modified as stated in opinion and as modified affirmed, with ten dollars costs and disbursements to appellants. Order to be settled on notice.

App. Div.]

First Department, May, 1917.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
SALVATORE F. SELLARO, Appellant.

First Department, May 18, 1917.

Municipal corporations — city of New York — violation of Sanitary Code — evidence — jurisdiction — transfer of case to Court of Special Sessions — Inferior Criminal Courts Act, section 44, as amended, construed.

Prosecution of a defendant for the violation of section 124 of the Sanitary Code of the city of New York. Evidence examined, and *held*, sufficient to justify a conviction.

Where in such a case it appears that the magistrate before whom the defendant was first arraigned did not undertake to hold a Court of Special Sessions, but sat merely as a committing magistrate, and as such held the accused to answer under section 208 of the Code of Criminal Procedure, it was unnecessary for said magistrate in order to transfer jurisdiction to the Court of Special Sessions to make an order remitting the case for trial to said court, as provided by section 44 of the Inferior Criminal Courts Act of the City of New York as added by chapter 581 of the Laws of 1915. Said section has no application when the magistrate merely sits as a committing magistrate.

A city magistrate, merely because under certain circumstances he may become a Court of Special Sessions, does not thereby lose his power and authority as a committing magistrate, and when he sits as such his jurisdiction, power and duty are prescribed by chapter 7 of the Code of Criminal Procedure, section 188 *et seq.*

If a single magistrate enters upon a trial as a Court of Special Sessions, under section 44 of the Inferior Criminal Courts Act, as amended, and after so doing sees fit for any of the reasons stated in that section to remit the trial to another Court of Special Sessions, whether held by one magistrate or by three justices, he must make an order to that effect in order to confer jurisdiction upon the court to which the case is remitted to proceed with the trial thereof.

If, however, a city magistrate before whom a complaint is made does not undertake to hold a Court of Special Sessions, but sits merely as a committing magistrate, his powers and duties are prescribed by the Code of Criminal Procedure, and it is sufficient that he hold the defendant to answer. Thereupon the Court of Special Sessions, composed of three justices, will, upon information filed, and in a proper case, have jurisdiction to try the accused, or, if the crime charged be not triable before the Court of Special Sessions, the accused may be tried upon indictment.

APPEAL by the defendant, Salvatore F. Sellaro, from a judgment of the Court of Special Sessions of the City of New York,

county of New York, Part I, rendered against him on the 21st day of December, 1916, convicting him of violating section 124 of the Sanitary Code of the board of health of the department of health of the city of New York.

Isaac Franklin Russell, for the appellant.

Terence Farley, for the respondent.

SCOTT, J.:

The defendant was convicted in the Court of Special Sessions of having violated on March 8, 1916, section 124 of the Sanitary Code, which reads, in part, as follows: "Wood naphtha, otherwise known as wood alcohol or methyl alcohol; sale and distribution regulated.—No person shall sell, offer for sale, give away, deal in, or supply, or have in his or her possession with intent to sell, offer for sale, give away, deal in, or supply, any article of food or drink or any medicinal or toilet preparation, intended for human use internally or externally, which contains any wood naphtha, otherwise known as wood alcohol or methyl alcohol, either crude or refined." (See Cosby's Code Ord. [Anno. 1915] pp. 390, 391.)

The appellant offered no evidence in his defense, and the case was submitted on the People's evidence undisputed. It was quite sufficient to justify the conviction, and if there were no other question involved we should content ourselves with affirming the judgment without opinion. The appellant raises, however, a jurisdictional question which deserves consideration.

The record consists of an affidavit made by a pharmacist in the employ of the department of health of the city of New York; an order of a city magistrate holding the defendant to answer; an information by the district attorney; the proceedings before the Court of Special Sessions, and the judgment of that court.

The point which the defendant now makes is that the Court of Special Sessions, before which he was tried, never acquired jurisdiction to try him because it does not appear that the city magistrate, before whom he was first arraigned, had made an order remitting the case for trial to a Court of Special Sessions provided for by section 44 of the Inferior Criminal Courts Act of the City of New York (Laws of 1910, chap. 659), as added by

App. Div.]

First Department, May, 1917.

chapter 531 of the Laws of 1915. This contention he attempts to support by two cases decided by the Appellate Division of the Second Department, which if applicable to the present case, are decisive of this appeal. (*People ex rel. New York Disposal Corporation v. Freschi*, 173 App. Div. 189; *People v. Kalbfleisch Co.*, 174 id. 108.)

They are not, however, applicable. They arose under prosecutions commenced under section 44 above mentioned, or under section 95 of the act of 1910, while this prosecution did not.

By chapter 531 of the Laws of 1915 the Legislature added to the Inferior Criminal Courts Act (Laws of 1910, chap. 659) a new article designated as article 3A, and providing for Courts of Special Sessions to be held by single city magistrates. The 1st section of this article, designated as section 43 of the amended act, provides that "A Court of Special Sessions may be held in the city of New York by any one city magistrate where the offense charged is one of the following classes of misdemeanor." Then follows a list of minor offenses constituting misdemeanors. The 2d section of the added article, designated as section 44 of the amended act, provides the procedure to be followed by a single magistrate undertaking to hold a Court of Special Sessions. He cannot do this unless the defendant, after having been duly informed of his rights, consents thereto, or if the department in charge of the prosecution or district attorney objects. If the defendant consents, and the head of the department conducting the prosecution or the district attorney does not object the magistrate may proceed to hold a Court of Special Sessions exercising all the powers of the Court of Special Sessions consisting of three justices provided for in articles 2 and 3 of the Inferior Criminal Courts Act. Then follow the provisions out of which the defendant's objection to the jurisdiction arises. They are: "*In any case where the magistrate holds a Court of Special Sessions the action shall be tried and finally disposed of by him, or if the department in charge of the prosecution or the district attorney, as the case may be, and the defendant consent, may be tried by a Court of Special Sessions to be held by the next magistrate sitting in the same Magistrate's District Court or be remitted with the papers to the Court of Special Sessions provided for in articles*

two and three hereof for trial there by three justices. At any stage of the proceeding before judgment the magistrate may * * * suspend the trial and cause the complaint and other papers to be sent to the district attorney for trial, upon information, by three justices in the Court of Special Sessions, provided for in articles two and three hereof."

It will be observed that the provisions just quoted are applicable only when the magistrate "holds a Court of Special Sessions." They have no application when he merely sits as a committing magistrate. It is fitting and proper when the trial of a criminal action is begun by one Court of Special Sessions, and is then transferred to another, that the fact of transfer should be evidenced by a formal order to the end that the continuity of jurisdiction may be preserved, and this is all that was held in the two cases above cited and on which defendant relies. A city magistrate, however, merely because under certain circumstances he may become a Court of Special Sessions, does not thereby lose his power and authority as a committing magistrate, and when he sits as such his jurisdiction, power and duty are prescribed by chapter 7 of title 3 of part 4 of the Code of Criminal Procedure, section 188 *et seq.* After providing for the course of the proceedings before a committing magistrate, section 208 provides that "If, however, it appear from the examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect." Then follows the form of order to be so signed, being the identical form signed by the magistrate in the present case and holding the defendant to answer. The distinction between the course of procedure to be followed in the two cases is simple and perfectly clear. If a single magistrate enters upon a trial as a Court of Special Sessions under section 44 of the Inferior Criminal Courts Act, and after so doing sees fit for any of the reasons stated in that section to remit the trial to another Court of Special Sessions, whether held by one magistrate or by three justices, he must make an order to that effect in order to confer jurisdiction upon the court to which the case is remitted to proceed with the trial

App. Div.]

Fourth Department, April, 1917.

thereof. If, however, a city magistrate before whom a complaint is made does not undertake to hold a Court of Special Sessions, but sits merely as a committing magistrate, his powers and duties are prescribed by the Code of Criminal Procedure, and it is sufficient that he hold the defendant to answer. Thereupon the Court of Special Sessions composed of three justices will, upon information filed and in a proper case, have jurisdiction to try the accused, or if the crime charged be not triable before the Court of Special Sessions, the accused may be tried upon indictment. This distinction is clearly recognized although not elaborated by the learned justice who wrote the opinion in the *New York Disposal Corporation Case* (*supra*). And this authority of a city magistrate to hold the accused for trial at a Court of Special Sessions composed of three justices is expressly reserved by the last sentence of section 44 above referred to.

In the present case it is made quite clear by the record that the magistrate before whom the defendant was first arraigned did not undertake to hold a Court of Special Sessions, but sat merely as a committing magistrate and as such held the accused to answer under section 208 of the Code of Criminal Procedure. We find no merit in the appeal. The judgment is affirmed.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Judgment affirmed.

CHARLES NAUD, Appellant, v. KING SEWING MACHINE
COMPANY, Respondent.

Fourth Department, April 4, 1917.

Pleading — action against master for personal injuries — defense alleging that Compensation Commission has disallowed claim — demurrer.

A demurrer to a separate defense contained in the answer of an employer sued by an employee for personal injuries which alleges that the State Workmen's Compensation Commission has determined that the plaintiff's claim was not founded upon an accident and was disallowed should be sustained.

DE ANGELIS, J., dissented.

APPEAL by the plaintiff, Charles Naud, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 13th day of July, 1916, overruling a demurrer to a separate defense contained in the answer.

Karl A. McCormick, for the appellant.

Clinton B. Gibbs, for the respondent.

KRUSE, P. J.:

1. If the complaint does not state facts sufficient to make out a cause of action, the answer would not be demurrable, although insufficient, because, as has been stated, "a bad answer is good enough for a bad complaint." (*Barter v. McDonnell*, 154 N. Y. 432, 436.)

2. But the complaint states a good cause of action. While some of the allegations of the complaint are germane to a claim under the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.), it does not affirmatively appear by the complaint as a whole that the claim is of that character.

3. The answer setting up the determination of the Commission is insufficient in law upon the face thereof. It appears by the allegations of the answer that the Commission determined that the claim was not founded upon an accident and was disallowed. Such determination is not an adjudication that the claim is covered by the Workmen's Compensation Law, but quite the reverse.

The interlocutory judgment overruling the demurrer should be reversed, with costs, and demurrer sustained, with the usual leave to the defendant to plead over, if so advised, upon the payment of costs.

All concurred, FOOTE and LAMBERT, JJ., in result only, except DE ANGELIS, J., who dissented.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to the defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal.

App. Div.]

Fourth Department, April, 1917.

ANTONIO CORICO, Appellant, v. FRANK SULLIVAN SMITH, as Receiver of the PITTSBURGH, SHAWMUT AND NORTHERN RAILROAD COMPANY, Respondent.

Fourth Department, April 4, 1917.

Pleading — action against master for personal injuries — defense alleging that award for compensation was made to plaintiff — demurrer.

A demurrer to a separate defense of an employer sued by an employee for personal injuries which alleges that an award was made to the plaintiff pursuant to the provisions of the State Workmen's Compensation Law which the defendant stands ready and willing to pay should be overruled. But on overruling the demurrer the complaint should not have been dismissed but the plaintiff should have been given leave to withdraw the demurrer upon paying costs.

FOOTE, J., dissented, with memorandum.

APPEAL by the plaintiff, Antonio Corico, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Allegany on the 21st day of November, 1916, overruling a demurrer to part of the answer and dismissing the complaint.

James O. Sebring, for the appellant.

D. D. Dickson, for the respondent.

KRUSE, P. J.:

The plaintiff challenges the sufficiency of the sixth separate defense of the defendant contending that the matters therein stated are no defense to the action. It is therein alleged that pursuant to the provisions of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.) an award was made to the plaintiff for damages sustained by him resulting from the injuries set forth in the complaint and that the defendant stands ready and willing to pay the same; that the plaintiff was a party to the proceeding and that the award was duly and properly made by the Commission. The allegation that the award was duly made is the same in

effect as though the answer had set forth the facts showing that the Commission had jurisdiction to make the same. If the plaintiff controverts that allegation, the defendant is required on the trial to make proof of the facts but they need not be pleaded. (Code Civ. Proc. § 532.)

It is true, as plaintiff contends, that if the defendant was engaged in interstate commerce and the plaintiff was injured through its negligence in doing interstate commerce work while he was so employed by it in such commerce as alleged in the complaint, his claim is covered by the Federal Employers' Liability Act (35 U. S. Stat. at Large, 65, chap. 149, as amd. by 36 id. 291, chap. 143) and not by the Workmen's Compensation Law (*Matter of Winfield v. New York Central & Hudson River Railroad Company*, 216 N. Y. 284), but these allegations of the complaint are not consistent with the admissions that the award was duly made. He cannot bring to his aid these allegations in his attack upon the answer by demurrer; he is required to stand upon the allegations in the answer and there is nothing in the answer showing that these facts were made to appear before the Commission. The inference is quite to the contrary because the allegation is that the award was duly made. If the plaintiff had contended before the Commission as he does here and the facts had been made to appear to support his contention that plaintiff's injuries were sustained in interstate commerce work through the negligence of the defendant, the award could not be properly made under the Workmen's Compensation Law.

Furthermore, I am of the opinion that the plaintiff could waive his claim under the Federal Employers' Liability Act by omitting to state the facts showing that his claim was within that act. If that question was not raised by any party to the proceeding, I am unable to see how the plaintiff could now avail himself of his right to maintain an action under the provisions of the Federal statute. As well might the defendant urge now for the first time that it should not pay the award made by the Commission to plaintiff for his injuries because he was engaged in interstate commerce work at the time he was injured. Clearly, the defendant would be required to raise that question upon the trial in the action or proceeding brought

App. Div.]

Fourth Department, April, 1917.

for the determination and adjudication of the claim, otherwise it would be waived. (*Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532; *Minneapolis & St. Louis R. R. Co. v. Winters*, Id. 353.)

2. The defendant also challenges the sufficiency of the complaint, which it may do to offset plaintiff's contention that his answer is bad. (*Baxter v. McDonnell*, 154 N. Y. 432.) It is contended that the plaintiff should have specifically alleged that the action was commenced within two years from the time the cause of action accrued since the Federal Employers' Liability Act provides that no action should be maintained unless commenced within that time. As to that it is sufficient to say that it appears by the complaint that the plaintiff was injured on the 28th day of January, 1916, so the two years have not even yet expired and besides the reasoning of the Court of Appeals in a recent case would seem to indicate that this limitation is upon the remedy and not upon the right. (*Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 101.) Although it should be stated in this connection that the United States Supreme Court has recently held that where the record shows that the action was not begun until the time had elapsed, the point is available to the defendant even if the defendant did not raise the objection in his pleading. (*Atlantic Coast Line Railroad v. Burnette*, 239 U. S. 199.)

While the demurrer was properly overruled I think the complaint should not have been dismissed. The plaintiff should not be precluded from controverting the allegations of this answer simply because he has failed in his effort to test its legal sufficiency.

The judgment should be, therefore, modified by permitting the plaintiff to withdraw his demurrer within twenty days upon the payment of the costs of the demurrer, and as so modified the judgment should be affirmed, without costs to either party upon this appeal.

All concurred, LAMBERT and DE ANGELIS, JJ., in result only, except FOOTE, J., who dissented and voted to sustain the demurrer, with leave to the defendant to amend his answer, if so advised, upon payment of costs, upon the ground that it is

not alleged that plaintiff presented his claim to the Workmen's Compensation Commission and himself sought to secure the award which was made.

Judgment modified by giving leave to the plaintiff to withdraw his demurrer within twenty days, upon payment of the costs of the demurrer, and as so modified affirmed, without costs of this appeal to either party.

EDWIN FAIRFAX NAULTY, Respondent, v. GORHAM MANUFACTURING COMPANY, Appellant.

First Department, April 5, 1917.

Principal and agent — action for commissions for procuring orders for goods to be manufactured and installed by defendant — pleading — variance — evidence — amendment of complaint — appeal — when question sought to be raised not insisted upon at trial.

In an action to recover for commissions on contracts for bronze work to be manufactured and installed by the defendant, the plaintiff alleged a verbal agreement by which he was to receive commissions on all orders procured by him, and this allegation was supported by his testimony. He was also permitted, without objection, to give evidence as to a special contract by which he was to be compensated for the procuring of orders in a specified territory, even though he was not the procuring cause, and no motion was made to amend the complaint to entitle him to recover on such a theory until the close of the entire case, but counsel for the defendant when entering upon the defense stated that defendant was prepared to meet the cause of action alleged and would object to testimony tending to support a cause of action on any other theory, and moved to strike out the evidence as to the special contract on the ground that it constituted a radical variance from the complaint. The court ruled that if the specific objection had been taken on the motion to dismiss at the close of the plaintiff's case, an amendment of the complaint would have been allowed, and that it would not constitute such a substantial variance as to defeat the action. At the close of the evidence the defendant renewed its motion for a dismissal, whereupon the plaintiff was allowed to amend by alleging, among other things, that the agreement was that he was not only to receive commissions on orders procured by him, but also on orders to the procurement of which he contributed in services, whether or not his services were the procuring cause.

Held, that the order granting the amendment should be reversed;

That, under the circumstances, the complaint should not be dismissed, but a new trial should be granted and an opportunity afforded the plaintiff to appeal at Special Term for an appropriate amendment.

App. Div.]

First Department, April, 1917.

Since the plaintiff was only entitled to receive commissions on contracts for bronze work manufactured by the defendant, it was error to allow commissions on the gross amount of a contract including fixtures manufactured by another.

It was error for the court to exclude evidence offered by the defendant to show not only that the plaintiff was not the procuring cause of a certain contract, but that it obtained the same through the efforts of others in no manner contributed to by the services of the plaintiff.

The verdict of the jury awarding commissions on certain specified contracts was against the weight of the evidence.

Although the defendant objected that the action was prematurely brought in so far as it related to commissions on a certain contract claimed not to have been formally executed until after the commencement of the action, such question is not before the court on appeal, since no further question was raised with respect to the matter, either by a motion to strike out or a request to charge, and since the plaintiff's right to recover on said contract was submitted to the jury without objection or exception and without reference to the fact as to whether or not the commissions were earned prior to the commencement of the action.

APPEAL by the defendant, Gorham Manufacturing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 21st day of January, 1916, as amended by an order entered in said clerk's office on the 27th day of January, 1916. The judgment was rendered upon the verdict of a jury. Defendant further appeals from an order entered in said clerk's office on the 14th day of January, 1916, denying defendant's motion for a new trial made upon the minutes.

Robert C. Beatty, for the appellant.

George Gordon Battle [*Addison A. Van Tine* with him on the brief], for the respondent.

LAUGHLIN, J.:

The recovery was for commissions to which the plaintiff claimed to be entitled by virtue of a parol contract with respect to orders for bronze work to be manufactured and installed by the defendant.

The plaintiff was the president and general manager of the Fairfax United States Mail Chute System, which was a corporation. In the month of January, 1910, negotiations were

opened between that company and the appellant for the manufacture of bronze mail chutes, and a formal agreement in writing therefor was prepared under date of February 11, 1910, which the evidence, however, tends to show was not executed until the latter part of May. The terms of the contract contemplated the obtaining of orders for bronze mail chutes by the Fairfax United States Mail Chute System, to be manufactured by defendant, and that the defendant should make certain advances for expenses, and an advance for fifty dollars per week for a specified period as an advance drawing account for a salesman, which advances were to be deducted from any amount to which the Fairfax System should become entitled under the contract. It was also provided that a selling commission of ten per cent should be allowed a salesman, and that the net profits, after deducting commissions paid the salesman, were to be divided equally between the two companies. The salesman to be employed was not designated, but it appears that it was understood that plaintiff was to be the salesman, and he was so employed. He obtained no orders, however, and earned no commissions, but defendant advanced to him the sum of \$1,170.95.

The plaintiff alleged that in the month of May, 1910, it was verbally agreed between him and the defendant that he should remain and continue in its employ for selling its bronze goods, other than those specified in said contract, for an indefinite period, "upon precisely the same basis as to compensation as that set forth" in said agreement in writing; and he alleges that the effect of the agreement was that he was to receive ten per cent on all contracts obtained and goods sold for the defendant; and that his commissions were to become due upon the acceptance "of the proposed tender, estimate or bids of the defendants" by the party to whom the same might be made. He alleges that pursuant to the *verbal* employment he procured orders aggregating the sum of \$251,950, which the defendant accepted and filled, and that he thereby became entitled to receive as commissions the sum of \$25,195, from which he concedes there should be deducted the amount of advances to him under the contract in writing and the sum of \$7,076.05 advanced to him under the verbal contract; and he

App. Div.]

First Department, April, 1917.

demands judgment in the first count of the complaint for the balance of \$16,949.

The complaint contained a second count for the fraudulent diversion of orders to deprive the plaintiff of commissions thereon; but after introducing some evidence tending to support that count the plaintiff withdrew it.

The answer is in effect a general denial with a counterclaim for moneys advanced in excess of certain commissions at the rate of five per cent conceded to have been earned by the plaintiff. The counterclaim was abandoned on the trial.

The plaintiff claimed commissions on eight contracts. The verdict shows that the jury disallowed his claim as to one and allowed a recovery on the other seven. The plaintiff claimed to be entitled to recover a commission of ten per cent on all of the contracts. The defendant conceded that he was entitled to commissions at the rate of five per cent on three of the contracts; but denied that he was entitled to commissions on the others. The jury allowed a recovery of ten per cent commissions on six of the contracts and five per cent on a contract for \$152,825, for bronze work on the Scottish Rite Temple at Washington. The plaintiff gave evidence tending to show that he rendered some services in endeavoring to obtain the Scottish Rite Temple contract, but he wholly failed to show that he procured or that his efforts secured that contract for the defendant. Two of the other contracts on which the plaintiff recovered commissions were for the bronze work on the East Boston Savings Bank and the Brockton National Bank. In the negotiations by which the defendant secured those contracts the plaintiff took no part. The commission recovered on the Scottish Rite Temple contract is more than the amount of the verdict. It follows that if the plaintiff was not entitled to recover that commission the judgment cannot be sustained.

At the close of the plaintiff's case counsel for the defendant moved for a dismissal on the grounds: (1) That the plaintiff had failed to prove facts sufficient to constitute a cause of action; (2) that there was no proof that the plaintiff was the procuring cause in securing the contracts for defendant; (3) that he had not sustained the burden of showing that he was the procuring cause with respect to the Scottish Rite Temple

contract; and (4) that there was no evidence that he had anything to do with securing either the Brockton National Bank or the East Boston Savings Bank contracts or of any agreement for commissions with respect thereto. The court, in denying the motion stated that the plaintiff had testified to a special contract by which he was to be compensated even though he was not the procuring cause.

The testimony to which the court referred was given by the plaintiff. It is to the effect that he negotiated a contract for the bronze work on the Springfield National Bank through one James, a Boston architect, and that Fullerton, the manager of defendant's bronze department, subsequently agreed with him that he should have a commission of ten per cent on any business that might come to the defendant through James' office. The two contracts, with respect to which he took no part in the negotiations, subsequently came to the defendant through James' office. The plaintiff further testified that in the spring of 1910 Fullerton agreed that he should have Boston and all of New England, Washington, Philadelphia and Baltimore as his exclusive territory, and that his understanding was that he was to enter the territory first and do the introductory work with respect to negotiating contracts, and that he was to receive ten per cent on jobs in his exclusive territory which he solicited or which were assigned to him and on which he did "some work," and that his point of view regarding exclusive territory was that he "was the only man soliciting business for the Gorham Company within that territory and that under an arrangement with Mr. Fullerton we divided up, it did not matter whether he closed the contract or I closed the contract, so long as I work upon some part of the job; if you please, so long as that had been assigned to me, either I had taken the assignment or it had been given to me to work up, that that business belonged to me and no one else. If I had gone into James's office and had taken up some business there with him, that business would be referred to me, and if it flowed — rather, if the drawing were in and I was not there at that time, it would still be my business. That is as clear an understanding as I can give of my idea of what I meant by exclusive territory." The plaintiff had first testified to a verbal

App. Div.]

First Department, April, 1917.

agreement between him and Fullerton by which he was to receive commissions on orders *procured* by him, which was according to the allegations of the complaint, and in this he was corroborated by his son. His testimony tending to show a different contract later is uncorroborated. It was received without objection, but no motion to amend the complaint to entitle plaintiff to recover commissions without showing that he was the *procuring cause* was made until the close of the entire case. For the most part that evidence was competent on the issue tendered by the complaint, under which the plaintiff was at liberty to offer any evidence tending to show the services he rendered; but in part, perhaps, it was not competent on that issue.

After the defendant entered upon its defense and when its counsel was offering certain exhibits in evidence a discussion arose between the court and counsel with respect to the materiality of the evidence, and counsel for the defendant stated that the cause of action alleged in the complaint was materially different from that proved, whereupon counsel for the plaintiff said that he intended to make a motion at the end of the case to conform the pleadings to the proof. Counsel for the defendant thereupon stated that defendant came prepared to meet the cause of action alleged, which was for commissions on orders *procured* by the plaintiff, and that he would object to testimony tending to support a cause of action on any other theory, and he moved to strike it out on the ground that it constituted a radical variance from the complaint. The court announced that if that specific objection had been taken on the motion to dismiss an amendment of the complaint would have been allowed, and ruled that it would not constitute such a substantial variance as would defeat the action. At the close of the evidence the defendant renewed its motion for a dismissal, whereupon the plaintiff moved to amend and was allowed to amend by alleging that the agreement was that plaintiff was not only to receive ten per cent commissions on orders procured by him, but also on orders "to the procurement of which the plaintiff contributed any services whether or not his services were the procuring cause of the defendant's having received said orders;" and that he was to receive such commissions

on all bronze goods furnished on contracts where James was the architect, and on all orders received for bronze goods coming to the defendant from Boston or the New England States, or Washington or Philadelphia or Baltimore "providing the plaintiff had rendered any substantial services in connection with the business of procuring said last-mentioned order." It is perfectly clear that by the amendment the plaintiff was allowed to plead new causes of action upon which he has recovered, and the recovery on which was essential to entitle him to a verdict. After the court manifested an intention to allow an amendment of the complaint plaintiff showed on cross-examination of Fullerton that the agreement between him and the plaintiff was that the plaintiff should do the work assigned to him and should receive commissions for services rendered in negotiating a contract made by the defendant where "he did any substantial work on the job;" but Fullerton denied that there was any agreement to pay the plaintiff ten per cent commission on any work, and testified that the arrangement was that the commission was not to exceed five per cent in any event, and that the amount of the commissions in each instance was to be determined by him. It is contended by the learned counsel for the respondent that in view of this admission by Fullerton with respect to the terms of the contract the defendant could not have been taken by surprise in allowing a recovery for commissions on contracts where the plaintiff was not the procuring cause, but rendered substantial services. It may well be that there was no surprise, but orderly procedure requires that a party, unless he clearly waives his right, is entitled to have the issues which he is called upon to meet presented by the pleadings, and ordinarily they can thus be better understood by a jury. Although some of the evidence received before the complaint was amended was subject to the objection that it was not within the issues, still by the motion made to dismiss the complaint and to strike out the evidence, it is quite evident that there was no intention on the part of the defendant to waive its right to have the issues framed by appropriate pleadings and to object to the enlargement thereof by adding additional causes of action at the trial. The plaintiff and his counsel should

App. Div.]

First Department, April, 1917.

have known before the case was brought to trial what cause of action his testimony would tend to establish, and there was no excuse for bringing the issues to trial in the expectation that other causes of action might be shown by the plaintiff's testimony, and that at the close of the evidence the complaint could be amended to conform it to the evidence. The ruling of the trial court, therefore, in allowing the amendment is reversed, and the amendment is disallowed; but in the circumstances we shall not dismiss the complaint for we think the plaintiff should be afforded an opportunity of applying at Special Term for an appropriate amendment, if so advised. This erroneous ruling alone is sufficient to require a reversal, but we deem it proper to express our opinion on some other points which have been argued at length and may arise if there shall be a new trial.

According to the original and amended complaint the plaintiff was only to receive commissions on contracts for bronze work manufactured by the defendant. The Scottish Rite Temple contract was a subcontract for the interior and exterior bronze work, and it included lighting fixtures not manufactured by the defendant, and which it let to another contractor for \$30,000. The plaintiff has recovered a commission on the gross amount of the contract, including the lighting fixtures. This was manifestly erroneous, for that item was embraced in defendant's contract as incidental to the work of its own manufacture and owing to the fact that bids were called for embracing both items.

The court also erred in excluding evidence offered by the defendant to show not only that the plaintiff was not the procuring cause of the Scottish Rite Temple contract, but that it obtained the contract through the efforts of others in no manner contributed to by the services of the plaintiff. With respect to that contract the plaintiff claimed to have interviewed representatives of the Scottish Rite order who had charge of letting the contract for the temple with a view to inducing them to favor Gorham bronze, and to have had an interview with Mr. Pope, the architect, and with Mr. Will, his representative, who was in charge of this matter; but he did not even know Mr. Will's name, and the latter testified that the plaintiff

never had communicated with or interviewed him concerning the bronze work, nor had any of those with whom the plaintiff claimed to have conducted negotiations in the matter. Mr. Will also testified that in the preliminary draft of the formal contract for letting the entire work, which was prepared by him, it was provided that Tiffany bronze only should be used. This was subsequently changed and a provision substituted authorizing either Gorham or Tiffany bronze, and the defendant, therefore, bid on the work and obtained the contract. The defendant attempted to show by the testimony of Mr. Will and by the testimony of Mr. Denholm, who represented Norcross Brothers Company, the general contractors, that the change was made solely at the instance of Denholm, who was a particular friend of Mr. Fullerton, and had promised the latter that if Norcross Brothers Company obtained the contract he would endeavor to have the bronze work let to the defendant. This evidence was objected to as immaterial and excluded. It is to be borne in mind that on the plaintiff's own theory and under the complaint as amended he was only entitled to recover a commission if his services substantially contributed to the procurement of an order. Without this evidence the jury may well have found that the contract was obtained by the defendant through the services of the plaintiff; but if this evidence had been received and the jury had accepted the testimony of Will it would have appeared that whatever efforts the plaintiff made with respect to obtaining this contract for the defendant were without avail and in no manner contributed to its obtaining the contract.

We are also of opinion that in so far as the jury found and awarded a commission of ten per cent on any of the contracts, and in so far as they found and awarded commissions on the East Boston Savings Bank and the Brockton National Bank contracts and on the Scottish Rite Temple contract, the verdict is clearly against the weight of the evidence. As already observed the first verbal contract as testified to by the plaintiff and corroborated by his son was limited to orders *procured* by the plaintiff. It is, we think, probable that if there had been a contract by which he was to receive commissions on work coming through the office of the architect James, without

App. Div.]

First Department, April, 1917.

regard to whether he took any part in procuring the contract; and there had been a contract by which he became entitled to commissions for any work done in exclusive territory, and for any work with respect to which he was not the procuring cause of the contract, but rendered services instrumental to some extent in bringing about the contract, he would have stated it to his attorneys in such manner that prior to the case being brought to trial, the pleading, if not originally framed to cover a right to recover on those grounds, would have been broadened. His claim that it was agreed that he would receive ten per cent is likewise improbable. The fact that that was the commission agreed to be paid to him under the contract between his company and the defendant with respect to the contracts for bronze mail chutes does not aid him. That was a new enterprise in which his company was embarking, and into which the defendant apparently had not yet ventured. It is evident, however, that the defendant was well known for its bronze work as it had executed many important public and private contracts. Fullerton denied that there was any agreement to pay the plaintiff a ten per cent commission; and evidence was adduced on the part of the defendant, which was uncontroverted, to the effect that the usual rate of commission to a salesman for procuring contracts for architectural bronze was from two and one-half per cent to three and one-half per cent, and that five per cent and expenses was the maximum, and that ten per cent was unheard of except for small and non-competitive jobs. Moreover, it is not probable that the defendant would enter into an agreement with plaintiff for an indefinite period to give him such an extensive exclusive territory as that to which he testified, embracing the principal cities of the East, all of which is denied by Fullerton, or to give him a ten per cent commission on all business coming to the defendant through the office of the architect, James, or to give him a ten per cent commission on all contracts with respect to which he rendered *any* substantial services, when that was, as the witnesses say, an unheard-of commission even for *fully negotiating* such contracts. With respect to one of the interviews at which the plaintiff claims that a ten per cent commission was promised by Fullerton, one Cun-

ningham, who so far as appears, was disinterested, corroborated Fullerton to the effect that there was nothing said about a commission of ten per cent. Furthermore, it appears by uncontroverted evidence that at times when, if the plaintiff was entitled to a commission of ten per cent the defendant was indebted to him in a considerable amount in excess of the advances made, he was asking for advances in excess of the regular amount and without making any requests for or claim that there were commissions owing to him; and that in similar circumstances at one time, when he was indebted to the defendant for a ring, he, by letter, in effect requested further indulgence, without making any claim that the defendant was indebted to him. The testimony of Fullerton with respect to the compensation which the plaintiff was to receive is not very convincing, for if the agreement is as he testified, and he and the plaintiff were unable to agree with respect to the amount to be paid as commissions on each contract, the plaintiff would be relegated to an action for the value of his services; but notwithstanding this, the evidence to which reference has been made, we think, preponderates against the plaintiff's claim that there was an agreement for commissions at the rate of ten per cent.

It is urged in behalf of the appellant that the action in any event was prematurely brought in so far as it relates to commissions on the Scottish Rite Temple contract. The formal written contract for that work was not executed until the 7th day of April, 1914. The action was commenced on the 2d of December, 1913. Of course, if the plaintiff should be entitled to recover anything for services in procuring that contract it would be incumbent upon him to show that the amount was earned and became due and payable prior to the commencement of the action. The defendant's bid, upon which, with some revisions, the work was finally let to it, was presented upwards of a month before the commencement of the action. The point sought to be raised by the appellant in this regard is not present for decision. The plaintiff testified that he was informed by Holbrook, defendant's president, and Fullerton, prior to the commencement of the action, in substance that the defendant had obtained the contract and that the matter had

App. Div.]

First Department, April, 1917.

been "closed." When the plaintiff offered the Scottish Rite Temple contract in evidence counsel for the defendant moved to strike out all evidence relating thereto on the ground that it was incumbent on the plaintiff to show the acceptance before the commencement of the action in order to recover commissions. The court denied the motion on the ground that notwithstanding the fact that the final contract was not made until after the commencement of the action, the jury would have a right to find on the testimony of the plaintiff, to which reference has been made, that the commissions had been earned prior to the commencement of the action. On the part of the defendant evidence was given tending to show that the minds of the parties had not fully met with respect to the contract until about the date of the final written contract; but no further question was raised with respect to the matter either by a motion to strike out or a request to charge, and the plaintiff's right to recover commissions on this contract was submitted to the jury without objection or exception, without reference to the fact as to whether or not the commissions were earned prior to the commencement of the action. Therefore, the point is not now presented for decision. We do not deem it necessary to consider the other points argued.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and DAVIS, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

FRANK VERDICCHIO, as Administrator, etc., of MICHELE VERDICCHIO, Deceased, Appellant, v. McNAB & HARLIN MANUFACTURING COMPANY, Respondent.

First Department, April 5, 1917.

Master and servant — Workmen's Compensation Law, State of New Jersey — action on said statute brought in courts of this State — failure of plaintiff to show compliance with foreign statute — preliminary determination by judge of Court of Common Pleas of New Jersey essential.

The Workmen's Compensation Act of the State of New Jersey, which confers a cause of action for the death of an employee who duly elects to take under said statute and to relinquish his common-law rights and any other statutory rights of his dependents in case of his death, requires the claimant in a death case, as a prerequisite to action on said statute, to have the amount of the weekly indemnity and the present value thereof first determined by a judge of the Court of Common Pleas of the State of New Jersey. Hence, the courts of this State will not entertain an action based on said statute where it is brought in total disregard of all of the provisions thereof relating to a preliminary determination by a judge of said foreign court of controversies respecting the facts and the right of the claimant to receive a gross sum.

It seems, moreover, that even where such action may be maintained in our courts, the plaintiff must show that he is a person who would be entitled to administration on the estate of the decedent in New Jersey.

APPEAL by the plaintiff, Frank Verdicchio, as administrator, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1916, denying his motion to overrule the demurrer herein and granting defendant's motion for judgment on the pleadings sustaining said demurrer and dismissing the complaint.

Charles A. Ludlow, for the appellant.

Herbert H. Flagg, for the respondent.

LAUGHLIN, J.:

The only point presented by this appeal which we deem it necessary to decide is whether the Workmen's Compensation Act, so called, of New Jersey, being chapter 95 of the Laws of

1911, as amended by chapter 174 of the Laws of 1913 and chapter 244 of the Laws of 1914, confers a cause of action for the death of an employee, who duly elected to take thereunder and to relinquish his common-law rights and any other statutory rights of his dependents in case of his death, to have the weekly indemnity given by the statute computed and the present value thereof determined and for the recovery thereof without applying to or action by a judge of the Court of Common Pleas of New Jersey as therein provided. It is alleged in the complaint that the plaintiff's intestate was employed by the defendant in the State of New Jersey to work in its foundry at Paterson, in that State, where in the course of such employment and arising therefrom he met with an accident on the 25th of January, 1916, from which he died, leaving both parents him surviving who were dependent upon him for support and who reside in Italy. Paragraph 7 of the statute provides that where its terms are accepted *compensation* for personal injuries to or for the death of an employee by accident not intentionally self-inflicted or not due to intoxication and arising out of or in the course of his employment shall be made by the employer according to the schedule prescribed by the statute. Paragraph 11, as amended in 1913, contains a schedule of compensation for injuries, and paragraph 12, as amended in 1913 and 1914, provides a basis of payments for death. The scheme in each instance is for weekly compensation for specified periods. In the case of injuries where the disability is temporary or is total and permanent the compensation is a specified percentage of the wages received by the employee at the time with a maximum and minimum and is payable during the disability not exceeding a specified number of weeks, and where the disability is partial but permanent the compensation is a fixed percentage of such wages for specified periods varying for different specified injuries with a like maximum and minimum and with a general provision with respect to injuries of the class stated "or where the usefulness of a member or any physical function, is permanently impaired," providing that the compensation "shall bear such relation to the amounts stated" in the schedule "as the

disabilities bear to those produced by the injuries named in the schedule." It is further provided in that section that if the employer and employee are unable to agree upon the amount of compensation to be paid in cases not covered by the schedule the amount shall be settled by a judge of the Court of Common Pleas by a summary proceeding specially prescribed in paragraph 20. Where the accident causes the death of the employee the compensation is a percentage of such wages with a like maximum and minimum for 300 weeks depending on the number of dependents of the class specified in the statute which includes parents, but it is also provided that in the event of the death of a dependent the right to the weekly payments shall cease. It is also provided that where, as here, there is more than one dependent the distribution of the compensation shall be made among them according to an order to be made by a judge of said court who shall on an application and presentation of the facts make the determination "according to the relative dependency." Paragraph 15 requires that notice of the injury be given to the employer by the employee or dependent unless he have notice thereof and that no compensation shall be allowed unless the employer has knowledge of the injury or the notice be given within ninety days. Paragraph 18 provides that in case of a dispute over, or failure of the employer and claimant "to agree upon, a claim for compensation," either party may submit the claim both with respect to questions of fact and the nature and effect of the injuries and the amount of compensation to any judge of the Court of Common Pleas of the county "as would have jurisdiction in a civil case," and such judge is authorized "to hear and determine such disputes in a summary manner," and it is provided that "his decision as to all questions of fact shall be conclusive and binding." Paragraph 19 provides that in case of death, "where no executor or administrator is qualified," the judge shall order and direct payment to be made to such person as would be appointed administrator of the estate of the decedent "upon like terms as to bond for the proper application of compensation payments as are required of administrators." Paragraph 20, as amended in 1913, regulates the procedure in case of a dispute between the claimant and the employer and contemplates the hearing and deter-

mination by the judge of the Court of Common Pleas summarily of any question with respect to notice to or knowledge of the injury by the employer as well as other questions and for the entry of judgment on the decision and for the satisfaction thereof to the extent that installments are paid. It also contemplates that the Supreme Court may review questions of law by certiorari.

Paragraph 21, as amended in 1913, provides that on the application of either party on due notice to the other the compensation may be commuted by the Court of Common Pleas "at its present value when discounted at five per centum simple interest" if it shall appear to be for the best interest of the claimant "or that it will avoid undue expense or undue hardship to either party, or that such employee or dependent has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the greater part of his business or assets." The statute then enjoins upon the judge of the Court of Common Pleas, upon whom only the authority to commute is conferred, the rule to be observed in passing upon such an application, viz., "that it is the intention of this act that the compensation payments are in lieu of wages, and are to be received" by the claimant in the same manner in which wages are ordinarily paid and that, therefore, commutation "is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure." Authority is also conferred upon the judge in determining a dispute with respect to the right to compensation or the amount or commutation thereof to settle and determine the amount to be paid for legal fees and declares it to be unlawful and a contempt of court for "any lawyer or other person" to ask or to receive more.

The plaintiff brings this action in total disregard of all of the provisions of the statute which contemplate an endeavor on the part of the claimant to agree with the employer and a determination of any controversy with respect to the facts and to the right of the claimant to receive a gross sum by commutation by a judge of the Court of Common Pleas of New Jersey. The decedent elected to accept the rights and remedies given by these statutory provisions in lieu of any other right or remedy

that he or his dependents might have, and this action is predicated upon the contractual liability thereby created. As has been seen, the right of his dependents is conditioned under the statute upon either an agreement between them and his employer or a decision by the judge of the Court of Common Pleas on any dispute between them with respect to notice to or knowledge by the employer within the time specified of the injury which resulted in the death of the employee and of any other question of fact upon which the right to compensation depends. This necessarily embraces any question with respect to his employment or rate of wages, or as to whether his death was accidental arising out of and in the course of his employment and was not intentionally self-inflicted or not due to intoxication and with respect to the proportion of the compensation that should be received by each dependent and with respect to whether the compensation should be commuted into a lump sum presently payable. It appears that the defendant was incorporated under the laws of this State and it is suggested that service could not be made upon it in compliance with the statute to enable the claimants to proceed thereunder in New Jersey. Defendant conducts business in New Jersey and the contract of employment and the employment were there and decedent met his death in that State. It is to be presumed that the statute will be given a construction in the jurisdiction where it was enacted to enable those having claims thereunder to enforce them as therein provided; but if plaintiff's rights are not enforceable under the statute then it is not apparent on what theory they can be enforced here and relief under the New Jersey statute is all the plaintiff now demands. There is no objection to the maintenance of a *cause of action* in the courts of this State based on a foreign statute which does not contravene any public policy of this State. The difficulty with the plaintiff's case, on the point now under consideration, is that the foreign statute does not give an independent cause of action enforceable anywhere. It has provided an administrative remedy by prescribed procedure in New Jersey as a substitute for any cause of action that there might otherwise be and it was optional with the employee to accept it or not and he stipulated with his employer to accept it. The fact that

App. Div.]

First Department, April, 1917.

jurisdiction was conferred upon a judge of a court of that State to determine all controverted questions of fact and whether or not there should be a commutation of the compensation creates no greater right than the conferring of such authority on an administrative board or body created by the Legislature. No controlling decision on the point has been cited or found by us but there have been other decisions at Special Term to the same effect. (See *McCarthy v. McAllister Steamboat Co.*, 94 Misc. Rep. 692; *Lehmann v. Ramo Films, Inc.*, 92 id. 418.) Until some amount is determined upon as compensation in accordance with the statute no action can be maintained by a claimant based on the statute. Moreover if the action could be maintained here it is not at all clear that it could be enforced by the plaintiff who does not show that he is the person who would be entitled to administration in New Jersey; and, therefore, a recovery by the plaintiff might not prevent a recovery by the dependents or in their right in New Jersey.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

DAVID RUBEL and EDITH RUBEL, Infants, by JACOB RUBEL,
Their Guardian ad Litem, Respondents, v. ERNEST HONIG,
Appellant.

First Department, April 5, 1917.

Bills and notes — action on non-negotiable promissory note — defense — conditional delivery of note — conflicting testimony as to application of interest paid — erroneous direction of verdict — evidence.

Where the defendant, sued on a non-negotiable promissory note, sets up as a defense that the sole consideration for the note was certain certificates of deposit delivered to him by the father of the payees named in the note to secure the payment of moneys which a partnership, of which the father of the payees was a member, owed to the defendant, and the proof raises a question of fact as to whether certain interest paid by the defendant was paid on account of the certificates of deposit

received by him or was paid upon the note, it was error for the court to decide, as a matter of law, that the payment of the interest made the note effective and to direct a verdict for the plaintiff, it being for the jury to say upon which of the two obligations the interest was paid.

Under the circumstances it was competent for the defendant to show that the note never had a valid inception, and that the delivery thereof to the father of the payees was conditional, and that the condition was that the note was not to take effect or be delivered to the payees until the payment of said indebtedness to the defendant.

APPEAL by the defendant, Ernest Honig, from a determination and order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 22d day of May, 1916, affirming a judgment of the City Court of the City of New York in plaintiffs' favor, and also affirming an order of said court denying defendant's motion for a new trial. An appeal is also taken from the judgment and order so affirmed.

Abraham P. Wilkes, for the appellant.

James Garfield Moses, for the respondents.

LAUGHLIN, J.:

The recovery was on a non-negotiable promissory note made by the defendant, of which the following is a copy, to wit:

"NEW YORK, N. Y., Feb. 20th, 1908.

"For value received I promise to pay to David and Edith Rubel on demand Six Hundred and Ninety Eight & 34/100 Dollars, with interest from Jan. 1st, 1908. Said interest to be at the rate of 6% per annum, and payable January 1st and July 1st each year.

(Sgd) ERNEST HONIG."

The payees were infants of eight and seven years of age respectively, and the guardian *ad litem* by whom they bring the action is their father. The defendant pleaded as defenses (as the answer was construed and accepted on the trial) and offered evidence tending to show that a copartnership firm composed of the father of the payees and another was at the time the note was executed indebted to him in the sum of \$1,000 for goods sold and delivered; that to secure the payment thereof and the payment of any moneys that might become due to the defendant, the father of the payees delivered to the defendant

App. Div.]

First Department, April, 1917.

about two weeks prior to the making of the note two certificates of deposit of \$68.56 and \$629.78, respectively, executed by a department store, by which it certified that it held those amounts for the credit of the father of the payees, and that such certificates were indorsed by him to the order of the defendant; that said certificates of deposit constituted the only consideration received by him for the note; that the note was given at the time the certificates of deposit were cashed by the defendant; that the indebtedness, to secure which the certificates of deposit were delivered to the defendant, had not been paid at the time the action was commenced; that it was understood and agreed between the defendant and the father of the payees that the note should not be deemed a promissory note or an obligation or evidence of an obligation in favor of either the plaintiffs or their father until said indebtedness owing by the firm of the father of the payees to the defendant was paid.

In behalf of the plaintiffs their father testified that the money represented by the certificates of deposit belonged to them, and that the certificates were delivered to the defendant as a loan, and that the note was given therefor. The defendant denied that he was informed that the certificates represented moneys belonging to the children, and testified that when the certificates were originally delivered to him there was no agreement to give a note therefor; and that the note was subsequently given in the names of the children at the instance of their father in order to conceal from his partner the fact that he had this money, and in order to prevent its being reached by any creditors of the firm; and he offered evidence to show that it was agreed between him and the father of the payees that the note was not to be delivered to the payees but was to remain in the hands of their father; and that it was not to take effect as an obligation against the defendant until the payment of said indebtedness; and he offered to show the conversations between him and the father of the payees at and prior to the time the note was made and delivered, with a view to showing that it was understood and agreed that it was to be held by the father of the payees, and was not to be delivered to the payees until the said indebtedness was paid and was not to become a binding obligation until that time.

The testimony of the father of the payees tends to show that the defendant made the semi-annual payments of interest on the note up to and including January 1, 1914; but the defendant testified that when he received the certificates of deposit the father of the payees said he would have to pay interest on the proceeds of the certificates of deposit. According to the testimony of the defendant, that was before there was any arrangement for giving a note. The defendant, therefore, claims that the payments of interest made by him were payments in accordance with that arrangement, and not payments of interest on the note. The plaintiffs alleged the payment of interest on the note, but this allegation was fairly put in issue by a denial thereof, accompanied by an admission by the defendant that he paid the sum of twenty-one dollars from time to time to the father of the payees as interest, which accords with his testimony that the interest was paid on account of the money and not on the note. In this state of the record the plaintiffs are not in a position to claim that by the payment of interest the note became effective, for whether or not interest was paid on the note was a controverted question of fact and could not be decided in favor of the plaintiffs as a matter of law, as was done by the direction of the verdict.

It was, therefore, entirely competent for the defendant to show, as he offered to show, that the note never had a valid inception, and that the delivery thereof to the father of the payees was conditional, and that the condition was that it was not to take effect or to be delivered to the payees until the payment of said indebtedness to the defendant. (Neg. Inst. Law [Consol. Laws, chap. 38; Laws of 1909, chap. 43], § 35; *Smith v. Dotterweich*, 200 N. Y. 299.)

It follows that the determination of the Appellate Term and the judgment and order of the City Court should be reversed and a new trial ordered, with costs to appellant in all courts to abide the event.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Determination and order and judgment of City Court reversed and new trial ordered, costs to appellant to abide event.

SZWENTO JUOZUPO LET DRAUGYSTES (ST. JOSEPH SOCIETY),
Respondent, v. MANHATTAN SAVINGS INSTITUTION, Appellant.

First Department April 18, 1917.

Bills and notes — liability of savings bank for paying forged draft — what does not constitute payment — liability of commercial bank for payment on forged signature.

Where the president of a membership corporation presented its pass book and a draft, on which he had forged the signatures of its trustees, to a savings bank, the by-laws of which provide that drafts on deposits might be made by an order in writing, and that payments might be made "in specie, bills or by check," and after the exercise of reasonable care in determining the genuineness of the signatures on the draft a check was delivered to the president of said corporation drawn to its order, on which he forged the signatures of the trustees and drew the money, which he converted to his own use, neither the delivery of the check nor the subsequent payment thereof on the forged indorsements constituted payment, and the defendant savings bank is liable to the plaintiff.

Although a commercial bank is liable as matter of law for payment on a forged signature, a savings bank is bound only to exercise reasonable care in determining the genuineness of the signatures on a draft drawn on a deposit.

APPEAL by the defendant, Manhattan Savings Institution, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of April, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 28th day of April, 1916, denying defendant's motion for a new trial made upon the minutes.

George C. Holt [*Henry W. Kennedy* with him on the brief],
for the appellant.

Alvin C. Cass, for the respondent.

LAUGHLIN, J.:

The plaintiff is a membership corporation and it brought this action to recover a balance of \$2,976.74 claimed to have been on deposit to its credit on the 23d day of September, 1915, with

the defendant, which is a savings bank. The defendant pleaded that on the 14th day of August, 1914, it paid to the plaintiff \$2,000, and it admitted liability for the balance. The verdict was directed for the entire amount claimed.

There is no controversy with respect to the facts. The appeal presents a question of law only with respect to whether there was a payment of \$2,000 by the defendant. The alleged payment was made at the time stated on the presentation of the pass book by the president of the plaintiff and a draft, to the order of its trustees, on the defendant, under the seal of the plaintiff and signed by its president and in the names of its trustees whose signatures were, to the knowledge of the defendant, required to authorize payment. The signatures of the trustees had been forged by the president. The draft clerk of the defendant compared the signatures on the draft with genuine signatures on file with the defendant and was of opinion that they were genuine. He made the usual entry in the day book of the defendant and in the pass book of the amount to be drawn and redelivered the draft to plaintiff's president and sent the pass book to the paying teller who, on presentation to him of the draft and after comparing the signatures with the genuine signatures and being of opinion that they were all the same, delivered to the president of the plaintiff defendant's check for \$2,000 drawn to the order of the plaintiff on the Citizens Central National Bank, which was a commercial bank in which defendant had a deposit account.

The by-laws of the defendant provided, among other things, that drafts on deposits might be made by the depositor personally or by an order in writing, but that no person should have a right to demand either principal or interest without producing the pass book in order that the payment might be entered therein; that payments might be made "in specie, bills or by check," and that while the officers and clerks would endeavor to prevent fraud on depositors, all payments made to persons producing the pass book should be "good and valid payments."

The pass book having been presented it is conceded that the defendant, notwithstanding the by-law, was bound only to exercise reasonable care in determining the genuineness of the

signatures on the draft, and that a question of fact was presented with respect to whether in accepting the draft it was guilty of negligence, although a commercial bank would be liable as matter of law for payment on a forged signature, and the authorities so hold. (*Appleby v. Erie County Savings Bank*, 62 N. Y. 12; *Thomson v. Bank of British North America*, 82 id. 1; *Noah v. Bank for Savings*, 171 App. Div. 191; *Kelley v. Buffalo Savings Bank*, 180 N. Y. 171; *Schneider v. Union Dime Savings Bank*, 93 Misc. Rep. 166.) Therefore, since the verdict was directed, it must be assumed for the purposes of the appeal that the defendant was free from negligence in accepting the draft, and that if it had made the payment in money, as authorized by the by-law, the judgment could not be sustained.

Counsel for the appellant contends that the delivery of the check constituted payment since the contract, evidenced by the by-laws, authorized payment by check; but counsel for the respondent contends that the delivery to and acceptance by the plaintiff of the check was a conditional payment only, and that the defendant, in effect, contracted to pay the check to the plaintiff or upon its authorized indorsement, and that, in the absence of an express agreement that the check was to be taken in satisfaction and payment, there was no payment unless and until the check was paid in due course to the plaintiff or on its authorized indorsement. It appears that the president of the plaintiff indorsed the check in his official capacity and forged the indorsements of the two trustees thereon, and the next morning before banking hours requested one Jagocki, a steamship broker and private banker, to cash it. Jagocki, not having sufficient cash, accompanied the president of the plaintiff to the Mechanics' Bank of Brooklyn and introduced him to the manager as the president of the plaintiff, whereupon the manager offered to cash the check if Jagocki would indorse it. He did indorse it and thereupon the manager paid the money to the plaintiff and the same day presented the check through the clearing house to the bank on which it was drawn and it was honored. The president of the plaintiff misappropriated the proceeds of the check. The indorsement of the trustees was essential to pass title to the check, and it is, therefore, clear from the authorities

cited that such payment of the check was unauthorized, and that the drawee could not lawfully charge the same against the defendant's deposit account. (*Bank of British North America v. Merchants' Nat. Bank of N. Y.*, 91 N. Y. 106; *Kearny v. Metropolitan Trust Co.*, 110 App. Div. 236.) The evidence traces the check no further and presents no question of ratification by, or negligence on the part of, or estoppel as against the plaintiff in favor of the defendant.

The point presented for decision is, therefore, whether the plaintiff was limited to any remedy it had against the drawee or was at liberty to disregard the giving of the check and to elect to hold the defendant on the original indebtedness, as it did by bringing this action. It is quite clear, I think, that the mere delivery of the check to the president of the plaintiff, who was authorized to receive it, on the assumption that the defendant was not guilty of negligence in honoring the draft, did not constitute payment, for if the drawee had refused to honor the check, even though it had sufficient funds to the credit of the defendant, the plaintiff could not have recovered thereon against the drawee, and its only cause of action would have been against the defendant, either on the check or on the original indebtedness for which it was given. (*Hentz v. National City Bank*, 159 App. Div. 743; *Burstein v. Sullivan*, 134 id. 623.) If the president of the plaintiff, having thus forged the indorsements of the trustees on the check, had deposited the same to his own credit in another bank, such bank would be liable to the plaintiff for the proceeds of the check as for moneys had and received to its use (*Porges v. U. S. Mortgage & Trust Co.*, 203 N. Y. 181; *Robinson v. Chemical National Bank*, 86 id. 404; *Schmidt v. Garfield National Bank*, 64 Hun, 298; *affd.*, 138 N. Y. 631); and in the case at bar it undoubtedly had a cause of action for conversion against the drawee for the value of the check. (*Burstein v. People's Trust Co.*, 143 App. Div. 165. See, also, *Moch v. Security Bank*, 166 App. Div. 121, 125; *Havana Central Railroad Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 427; *Porges v. U. S. Mortgage & Trust Co.*, *supra.*) There are conflicting decisions on the question as to whether where a debtor gives a check to his creditor to pay an indebtedness and an employee or official of

the creditor cashes it without authority or even on a forged indorsement, that constitutes payment, on the theory that the only obligation of the drawer is to have funds on hand to meet the check and that when his funds are appropriated in payment of the check that ends his liability to the payee. The appellant relies on *Burstein v. Sullivan* (*supra*); *Sage v. Burton* (84 Hun, 267, cited approvingly in *Allen v. Tarrant & Co.*, 7 App. Div. 172), and *Morrison v. Chapman* (155 id. 509) as sustaining that proposition; but in *Bernheimer v. Herrman* (44 Hun, 110, followed in *Falk v. Starr*, 81 Misc. Rep. 756); *Morris v. Hofferberth* (81 App. Div. 512); *Siegel v. Kovinsky* (93 Misc. Rep. 541); *Thomson v. Bank of British North America* (*supra*); and *Shepard & Morse Lumber Co. v. Eldridge* (171 Mass. 516, cited with approval in *Kearny v. Metropolitan Trust Co.*, *supra*) and *People's Trust Co. v. Smith* (215 N. Y. 489) the rule is stated to be that a payment by check constitutes a payment only when the check is paid *in due course*, and that payment thereof on a forged indorsement is not such payment, and that in the absence of proof of facts constituting estoppel against the payee he may sue the drawer and the latter must look to the bank which has wrongfully charged his account with the payment. Without further considering the authorities I am of opinion that in the case at bar neither the delivery of the check nor the subsequent payment thereof on the forged indorsements constituted payment. It was the defendant's check drawn against its own funds, and the drawee having wrongfully paid it could not lawfully charge it against the defendant. It was no more a payment than if the defendant had issued a draft or order on itself to the order of the plaintiff and subsequently honored the same on forged indorsements without exercising due care to discover whether or not they were genuine.

It follows that the judgment should be affirmed, with costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Judgment affirmed, with costs.

KOBRE ASSETS CORPORATION, Respondent, v. HYMAN D. BAKER, Appellant, Impleaded with ANCIENT ORDER OF HIBERNIANS and SARAH KOBRE, as Administratrix, etc., of MAX KOBRE, Deceased, Defendants.

First Department, April 20, 1917.

Bankruptcy — fraudulent transfers — authority of liquidating trustees to whom assets have been transferred under composition agreement to set aside fraudulent transfer under section 19 of Personal Property Law — effect of confirmation of composition agreement.

A liquidating trustee to whom the assets of a bankrupt are transferred pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and may, under the authority of section 19 of the Personal Property Law, maintain an action to set aside a fraudulent transfer by the alleged bankrupt notwithstanding the provisions of section 14 of the Bankruptcy Act of 1898 providing that upon the execution of a composition agreement the bankrupt shall become discharged from all his provable debts.

A trustee may, under section 19 of the Personal Property Law, maintain an action without the recovery of a judgment against the insolvent debtor. The effect of the confirmation of a composition agreement under which the assets of a bankrupt are transferred to a trustee is to substitute for the claims of the creditors against their debtors a right to share in the consideration agreed to be transferred.

APPEAL by the defendant, Hyman D. Baker, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of November, 1916, denying his motion for judgment on the pleadings, consisting of an amended complaint and answer.

J. A. Seidman, for the appellant.

Virginus Victor Zipris, for the respondent.

George Edwin Joseph, by leave, for the defendant Kobre, as administratrix.

LAUGHLIN, J.:

The point presented by the motion was whether a cause of action is stated against appellant, and as I view it that presents ultimately two questions of law. They are whether a liquidating trustee to whom the assets of a bankrupt are

App. Div.]

First Department, April, 1917.

transferred pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and authorized by section 19 of the Personal Property Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45) to maintain an action to set aside a fraudulent transfer by the alleged bankrupt, notwithstanding the provisions of subdivision c of section 14 of the Bankruptcy Act (30 U. S. Stat. at Large, 550), by which it is declared that upon the execution of a composition agreement the bankrupt shall become discharged from all his provable debts; and if the action be not authorized on that theory whether such liquidating trustee becomes vested with title and authority the same as a trustee in bankruptcy who could by virtue of the bankruptcy statute maintain the action.

The allegations of the complaint material to the decision of the appeal are in substance as follows: That Max Kobre, whose widow being administratrix has been permitted to file a brief, was conducting with his wife as copartner in the city of New York, a private bank which became insolvent, and on the 4th day of August, 1914, Eugene Lamb Richards, Jr., as Superintendent of Banks, "took possession of the choses in action, assets, property and business" of the bank for the purpose of liquidating the same under our State laws;* that two days later an involuntary petition in bankruptcy was duly filed against the copartnership as individuals and as copartners, and fifteen days thereafter the Federal court duly appointed said Richards temporary receiver of the same property that he had taken as Superintendent of Banks and he duly qualified; that thereafter and on October twenty-sixth the alleged bankrupts duly filed an offer of composition and subsequently filed an amended composition and they were referred to the referee in bankruptcy who reported favorably on the latter, and it was duly accepted by more than a majority in amount and number of the creditors, and on November 30, 1915, on due notice to the creditors, the amended composition, which provided for the organization under the laws of this State of a holding company to which all of said property was to be transferred for the purposes of liquidation and distribution as pro-

* See Banking Law (Consol. Laws, chap. 2; Laws of 1914, chap. 869), § 57 *et seq.*—[REP.]

vided in the amended composition to which reference is made in the complaint, was duly confirmed and approved, and that prior thereto and on the 25th day of May, 1915, the plaintiff had been organized under the laws of New York as such holding company in accordance with the amended composition agreement; that the decree of the Federal court confirming the composition agreement required that the copartners and Richards as such temporary receiver transfer and set over to the plaintiff "all choses in action and property and assets in their possession or otherwise, or to which the said Max Kobre or his creditors or this plaintiff in their behalf were entitled to," and the decree further provided that no provision thereof should be so construed as to give Kobre or any person other than the plaintiff "the right to retain any properties, choses in action or assets to which the depositors and creditors were entitled to at the closing of the bank and prior thereto, and that the plaintiff at any time thereafter" should have "the right to bring any and all proceedings to obtain the transfer, possession and title of any property, real or personal, which it is claimed is or was part of the assets" of the copartners or of either of them; that such property was transferred to the plaintiff in conformity with the composition agreement and decree, but that at the time the bank was so closed Kobre held an assignment from the Fifth Avenue Amusement Company of a contract, a copy of which is annexed to the complaint, under which it was entitled to receive the sum of \$6,500 in monthly installments, and after the closing of the bank and after the filing of the said involuntary petition in bankruptcy and by an instrument in writing delivered to appellant, he pretended to sell, transfer and assign his right, title and interest in said contract to the appellant without consideration, and that said assignment was executed by Kobre with intent to give and was received by the appellant with intent to take a preference and benefit over and to the exclusion of the creditors of Kobre in violation of the provision of section 60 of the Bankruptcy Act, and that at that time Kobre knew that he was insolvent, and the appellant knew of the insolvency and that said assignment from Kobre to the appellant was made wholly without consideration and with intent to defraud

App. Div.]

First Department, April, 1917.

the creditors of the assignor of the chose in action and of the moneys due thereunder to which moneys the plaintiff is entitled for the benefit of the creditors, and that said assignment was made with the collusive understanding and agreement that the moneys due thereunder would be retained by the appellant until the said bankruptcy proceeding had been disposed of and that then the agreement or the moneys due thereunder would be returned to the assignor by the appellant; that Kobre failed and omitted to deliver to the plaintiff the said agreement assigned to him by the Fifth Avenue Amusement Company, and by him assigned to the appellant; that at no time mentioned in the complaint did the copartnership or the members thereof have sufficient assets after the payment of the expenses and disbursements of the bankruptcy proceeding to pay their creditors in full; that the plaintiff by virtue of the provisions of the composition agreement and decree thereunder became vested with and is entitled to all the property and assets and choses in action transferred or retained by Kobre preferentially or in fraud of his creditors and to all the property which prior to the filing of the petition in bankruptcy he could by any means transfer or which might have been levied upon or sold under judicial process against him, and that there has become due under said agreement so assigned to Kobre and by him assigned to the appellant the sum of \$6,500, together with interest thereon from the 1st day of March, 1915, and that the plaintiff has no adequate remedy at law. The judgment demanded against the appellant is to have the assignment by Max Kobre to the appellant declared void on the ground that it was preferential and fraudulent as against the creditors of the private bank as well as against the plaintiff, and that he be compelled to deliver the same up in order that it may be canceled.

Section 60 of the Bankruptcy Act provides, among other things, that a person shall be deemed to have given a preference if, being insolvent, he has, within four months prior to the filing of the petition, made a transfer of any of his property and the effect of the transfer will be to enable any of his creditors to obtain a greater percentage of his debt than any other

of his creditors of the same class, and that if the transferee shall have reasonable cause to believe that the transfer would effect a preference, it shall be voidable by the trustee who may recover the property or its value from the transferee. (30 U. S. Stat. at Large, 562, § 60, as amd. by 32 id. 799, 800, § 13, and 36 id. 842, § 11.)

Section 12 of the Bankruptcy Act authorizes the bankruptcy court, either before or after the adjudication in bankruptcy, to confirm a composition offered by the bankrupt and duly accepted by the creditors if the court is satisfied that it is for the best interests of the creditors, and that the bankrupt has not been guilty of acts or failed to perform any of the duties which would bar a discharge, and that the offer has been made and accepted in good faith and has not been made or procured in violation of any of the provisions of the Bankruptcy Law, and that upon the confirmation "the consideration shall be distributed as the judge shall direct, and the case dismissed," and that where a composition is not confirmed the estate shall be administered in bankruptcy. (30 U. S. Stat. at Large, 549, 550, § 12, as amd. by 36 id. 839, § 5.)

Section 13 provides that the composition may be set aside upon the application of parties in interest filed within six months after the confirmation thereof if it shall be made to appear that fraud was practiced in procuring the composition and that knowledge thereof has come to the applicant since the confirmation. (30 U. S. Stat. at Large, 550, § 13.) Section 14 provides that the confirmation of a composition shall discharge the bankrupt from "debts, other than those agreed to be paid by the terms of the composition and debts not affected by a discharge." (30 U. S. Stat. at Large, 550, § 14, subd. c.) Section 70 of the Bankruptcy Act provides that a trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt as of the date of adjudication, excepting as to property which is exempt, including property transferred in fraud of creditors, and that the trustee may avoid any transfer by the bankrupt which any of his creditors might have avoided and may recover the property or its value unless the transferee was a *bona fide* holder for value prior to the date of the adjudication, and that upon the confirmation of the composition the title to the

App. Div.]

First Department, April, 1917.

property of the bankrupt "shall thereupon revert in him." (30 U. S. Stat. at Large, 565, 566, § 70, as amd. by 32 id. 800, § 16.)

It is argued on behalf of respondent that the creditors have by the six months' limitation prescribed in section 13, lost any remedy they may have had to set aside the confirmation of the composition agreement and to have the assets administered in the bankruptcy court. There is no doubt but that by the provisions of the Bankruptcy Act cited, and the further provisions of section 47 thereof (30 U. S. Stat. at Large, 557, § 47, as amd. by 32 id. 799, § 10, and 36 id. 840, § 8), a trustee in bankruptcy could have successfully maintained this action (*Matter of Rodgers*, 11 Am. Bank. Rep. 79; *Matter of Butterwick*, 12 id. 536; *Thomas v. Roddy*, 19 id. 873; *Matter of Kohler*, 20 id. 89; *Bank of North America v. Penn Motor Car Co.*, 31 id. 395); but it does not appear that a trustee was appointed and the plaintiff has acquired no title or interest from a trustee in bankruptcy.

Section 19 of the Personal Property Law (*supra*), which was taken from chapter 314 of the Laws of 1858 (as amd. by Laws of 1889, chap. 487, and Laws of 1894, chap. 740, and revised by former Pers. Prop. Law [Gen. Laws, chap. 47; Laws of 1897, chap. 417], § 7), provides as follows: "An executor, administrator, receiver, assignee or trustee, may, for the benefit of creditors or others interested in personal property, held in trust, disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes or in any manner interferes with the personal property of a deceased person, or an insolvent corporation, association, partnership or individual is liable to such executor, administrator, receiver or trustee for the same or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm treat as void and resist any act done or conveyance, transfer or agreement made in fraud of

creditors or maintain an action to set aside such act, conveyance, transfer or agreement."

If on the allegations of the complaint the plaintiff is shown to be a trustee within the contemplation of the provisions of said section 19 it is authoritatively settled an action is authorized without the recovery of a judgment against the insolvent debtor. (*Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 id. 168; *Spelman v. Freedman*, 130 id. 421.) It is, I think, quite clear that the creditors have no other remedy, and if this action cannot be maintained their debtor will have successfully perpetrated a fraud upon them by inducing them to consent to the composition agreement and then withholding from the liquidating trustee property which he was in duty bound to transfer, but which he had secretly, fraudulently and without consideration transferred to the appellant to hold for him pending the bankruptcy proceeding and on the termination thereof was to redeliver the same to him. Doubtless while the composition agreement stands the debts are conclusively deemed to have been discharged. (*Cumberland Glass Co. v. De Witt*, 237 U. S. 447; *Matter of Maytag-Mason Motor Co.*, 35 Am. Bank. Rep. 160; *Broadway Trust Co. v. Manheim*, 47 Misc. Rep. 415; *Mandell & Co. v. Levy*, 14 Am. Bank. Rep. 549; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, 121 App. Div. 764.) But such discharge is personal to the debtor and does not prevent the recovery of property from a fraudulent assignee (*Stephenson v. Bird*, 25 Am. Bank. Rep. 909); and if the alleged bankrupt failed to comply with the composition agreement the creditors would have an action thereon against him. (*Matter of Maytag-Mason Motor Co.*, *supra*; *Cumberland Glass Co. v. De Witt*, *supra*.) The effect of the confirmation of the composition agreement was, I think, to substitute for the claims of the creditors against their debtors a right to share in the consideration agreed to be transferred to the plaintiff, as provided in the composition agreement. The creditors, for the fraud alleged, would have been entitled, had they discovered it and applied in time, to have the composition agreement annulled; but having lost that remedy, they are now necessarily confined to their rights under the composition agreement. It is perfectly clear on the allegations

App. Div.]

First Department, April, 1917.

of the complaint that the plaintiff under the composition agreement became a trustee for the benefit of the creditors; but whether it become a trustee within the provision of said section 19 of the Personal Property Law is the question. No precedent precisely in point has been cited, excepting *Matter of Kass*, an unreported case in the United States District Court, Southern District of New York, decided in October, 1916, in which it appears from a quotation in the respondent's points that it was held that a like trustee appointed under a composition agreement was vested with the same authority to recover property fraudulently transferred as a trustee in bankruptcy would have had. In so far as it was within the power of the debtors, creditors and Federal court to clothe the plaintiff with such authority, I think it is to be inferred from the allegations of the complaint that such was their intention. The learned counsel for the appellant, however, argues on the authority of *Agne v. Schwab* (123 App. Div. 746) and kindred cases, that Kobre could not have brought the action and that, therefore, he could not confer authority upon the plaintiff to bring it. That argument would apply with equal force to an action brought by a trustee in bankruptcy or by an assignee for the benefit of creditors or by an executor or administrator of a deceased assignor; but in those instances it is clear that the action would lie notwithstanding the fact that the assignor could not have maintained it. It is argued that the trustee contemplated by the statute is a trustee appointed in general insolvency proceedings, either in the State or Federal court, who represents all the creditors. That argument is based on authorities holding that the assignee therein specified is an assignee under an assignment made in accordance with the assignment laws, and that a receiver in supplementary proceedings who does not represent all the creditors cannot maintain an action at law as for replevin or conversion for property fraudulently transferred by the debtor, and it is further argued that inasmuch as the debts have been discharged there are no creditors to be represented by the plaintiff. Although those whom the plaintiff represents have ceased to be creditors of the alleged bankrupts they are sufficiently creditors and interested in the assets which were to be distributed for

their benefit to be classed as creditors within the provisions of the statute. It is true that the transfer to plaintiff by the alleged bankrupts is not alleged to have been made in accordance with our insolvency laws; but it was made to terminate proceedings pursuant to the provisions of the bankruptcy laws, which were designed to accomplish a like purpose, namely, the distribution of the assets of the insolvent ratably among their creditors. The composition agreement was designed to accomplish the same purpose with respect to this property as if the bankruptcy proceeding had been continued, and, therefore, I think the statute is susceptible of a construction which will embrace such a trustee as the plaintiff. It is insisted that since the composition agreement was only for the benefit of creditors whose claims were provable in bankruptcy it does not embrace *all* of the creditors, and that, therefore, the plaintiff is not in a position analogous to that of an assignee for the benefit of creditors or a trustee in bankruptcy, or a *general* receiver or trustee. With respect to that argument I am of opinion that there is no presumption that there were other creditors; and if there are creditors whose claims were not provable in bankruptcy they had or have other remedies, and may well be left to protect their own rights, for the composition was designed to embrace precisely what would have been accomplished by the continuation of the bankruptcy proceeding, and had it been continued there can be no doubt under the provisions of the Bankruptcy Law and decisions cited that this action could have been maintained by the trustee in bankruptcy. Moreover, it has been held in many cases that a receiver in supplementary proceedings comes within the statute, and although he *does not represent all the creditors* he may maintain a *suit in equity*, as this is, to set aside fraudulent transfers. (*Stephens v. Meriden Britannia Co.*, 160 N. Y. 183; *Porter v. Williams*, 9 id. 142, 147; *Swift v. Hart*, 35 Hun, 128; *Bostwick v. Menck*, 40 N. Y. 383; *Pettibone v. Drakeford*, 37 Hun, 628. See, also, *Ullman v. Cameron*, 105 App. Div. 163; *affd.*, 186 N. Y. 339.)

It follows, therefore, that the order should be affirmed, with costs.

CLARKE, P. J., DOWLING, SMITH and DAVIS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

App. Div.]

First Department, May, 1917.

ROSE AMSTERDAM, Respondent, v. IGNACE I. APFEL, Appellant.

First Department, May 18, 1917.

Conversion — alleged agreement to purchase interest in lands with moneys advanced by plaintiff — evidence not establishing cause of action.

Action to recover moneys which the plaintiff alleged were advanced by her to be used by the defendant for the purpose of purchasing for the plaintiff a one-half interest in certain lands which were to be resold by the defendant and the profits from the sale equally divided between the parties, which moneys the plaintiff alleges were converted by the defendant to his own use. The defendant asserts that he received the money of the plaintiff under an agreement to give her one-half of any profits he might make by a personal purchase and sale of the property, after first repaying the plaintiff's advancement out of the proceeds of the sale. Evidence examined, and *held*, insufficient to establish a case of conversion and that a judgment for the plaintiff should be reversed and her complaint dismissed.

SCOTT, J., dissented, with opinion.

APPEAL by the defendant, Ignace I. Apfel, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of November, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of November, 1916, denying defendant's motion for a new trial made upon the minutes.

Charles Goldzier, for the appellant.

E. Walter Beebe, for the respondent.

DAVIS, J.:

Plaintiff sued in this action to recover \$1,697.74, \$1,500 of which she alleges she delivered to the defendant for the specific purpose of purchasing premises 505 and 507 Lafayette avenue, in the borough of Brooklyn, New York city, and which moneys she alleges were converted by the defendant. The circumstances surrounding the alleged conversion of the remaining \$197.74 will appear later in this opinion.

The complaint alleges that while the defendant was acting as plaintiff's attorney, on or about June 27, 1912, upon his representation that premises 505 and 507 Lafayette avenue, Brooklyn, could be purchased for \$1,500, subject to a mortgage then upon the premises *or thereafter* to be placed thereon, and could be resold at a profit, entered into an agreement with defendant whereby it was mutually agreed that the plaintiff should furnish to the defendant the sum of \$1,500, and should pay one-half of any necessary expenses for mortgage and closing of title, etc., incident thereto; that the defendant would undertake to purchase the said property 505 and 507 Lafayette avenue, and 20 and 22 Kosciusko street, in the borough of Brooklyn, city of New York, and that the plaintiff should have a one-half ownership therein, and that the defendant would have the other one-half ownership, and that the defendant would take charge of the property, and that the profits arising from its resale should be equally divided between the plaintiff and the defendant.

The complaint further alleges that under the agreement defendant was to act as her attorney in said purchase, and that between June 27, 1912, and July 2, 1912, in compliance with the agreement she paid defendant \$1,500, and that later, and in October, 1912, she paid him the further sum of \$197.74 upon his representation that the latter was her share of the necessary expenses of getting the mortgage, examining title, etc. And there is the further allegation that the defendant has not purchased the said property above referred to, nor caused them to be conveyed to the plaintiff; that the said sum of \$1,500 paid by the plaintiff to the defendant aforesaid was not used by defendant to purchase the property in question, nor any part thereof, but, on the contrary, the defendant has fraudulently converted the money to his own use; that the defendant's statement regarding the expenses of said premises was false and untrue and the plaintiff was not indebted to the defendant in the said sum of \$197.74, paid to the defendant as aforesaid, nor any part thereof, and the defendant has converted the same to his own use.

The answer denies all of the material allegations of the complaint except that it admits that plaintiff paid him \$197.74, and

App. Div.]

First Department, May, 1917.

that he did not cause the property to be conveyed to the plaintiff and that the \$1,500 was not used by him to purchase the property.

The jury rendered a verdict for the full amount claimed.

It appears that originally the plaintiff with the other members of her family owned the Lafayette street premises in question. They entered into an agreement with Brown & Weiss to exchange it for certain property on Madison avenue, and the exchange was made. The defendant was plaintiff's attorney in this transaction. He induced Brown & Weiss to exchange the Lafayette street premises for defendant's premises on Cortlandt street. This gave to the defendant the control of the Lafayette street premises. He thereupon conveyed the Lafayette street premises to R. S. S. Company for \$8,000 using for that purpose a deed which had been executed by the plaintiff and her family, but from which the vendee's name had been omitted. He afterwards wrote in the name of R. S. S. Company. As part of the transaction with R. S. S. Company defendant took back a lease from R. S. S. Company for the term of one year and ten months from the date of the lease June 28, 1912, with a privilege to purchase the premises any time prior to the expiration of the lease on May 1, 1914, for the sum of \$8,500 cash, or \$9,000 by paying \$2,000 cash and \$7,000 in a mortgage. The deed and lease referred to really constituted a mortgage. The various transactions took place between June 11, 1912, and June 28, 1912.

The defendant asserts that the plaintiff was cognizant of every step he took; that she paid him the \$1,500 for a one-half interest in his transaction in return for which he agreed to give her one-half of any profits he made on a sale of the property, first repaying to her out of the proceeds the \$1,500 she had paid him. On the other hand, the plaintiff denies that she knew anything about defendant's transactions as testified to by him, but asserts that she gave him the \$1,500 to buy the property for her in return for which she agreed to give him one-half of the profits on a sale of the property after she had taken out the \$1,500 paid by her. Plaintiff testified that defendant first broached the subject to her on the 21st or 22d of June, 1912. She thus describes the interview: "He called me away after

the dinner, before the dance, and he asked me if I had \$1,500. I said, 'yes.' He said, 'how would you like to invest it in buying back your old property at 505 and 507 Lafayette Avenue? You know the value of the property, you don't have to go into it; we will buy that back if you will put up \$1,500, and I will go to the Lawyers' Guarantee Trust Company,' I believe he said, 'and get a mortgage for \$8,000, or I will sell the property which I expect to do within the next three or four months, and I will give you back your \$1,500 and give you half of the profits.'"

She next saw defendant on June 27, 1912, when at his request she gave him a check for \$100 on account and he gave her the following receipt:

"Received from Rose Amsterdam check for One hundred Dollars on account of Fifteen hundred Dollars to be paid by her for the purchase of 505-7 Lafayette avenue, Brooklyn, 40x200, for said sum plus $\frac{1}{2}$ of any necessary expenses for mortgage closing of title, etc. Miss Amsterdam to have one-half interest in said property, I. I. Apfel to take charge of property and profits are to be divided equally. Balance of (\$1400.00/100) Fourteen hundred Dollars to be paid by July 2nd, 1912.

"June 27th, 1912.

"IGNACE I. APFEL."

She further testified that defendant said that she would have the additional expenses of taking title, and that he would buy the property before the second of July, and dispose of it during that summer. On July 1, 1912, plaintiff gave defendant the remaining \$1,400. She sailed for Europe the next morning. On her return she saw defendant many times and upon his demand paid him \$197.79 as part of the expenses in connection with the property. She testified that she often asked defendant why he did not sell the property and that he always answered that he was waiting for a better market.

There was thus a sharp conflict between the plaintiff and defendant as to the nature and character of the transaction. Defendant denies the making of the agreement set up in the complaint, and claims that the \$1,500 was the purchase price of one-half of his interest in the property. If such be the fact,

App. Div.]

First Department, May, 1917.

this judgment is wrong. In support of his contention defendant introduced in evidence an agreement between the plaintiff and himself dated July 1, 1912, concededly signed by the plaintiff. The agreement is as follows:

"Agreement made and entered into this 1st day of July, Nineteen hundred and twelve, between Ignace I. Apfel, party of the first part, and Rose Amsterdam, party of the second part.

"Witnesseth for and in consideration of the sum of Fifteen hundred (\$1500.00) Dollars, receipt whereof is hereby acknowledged, and other considerations, and the agreement and terms referred herein and to be performed by Rose Amsterdam; Ignace I. Apfel does hereby sell, assign, transfer and set over to Rose Amsterdam a one-half interest in a certain lease made between himself and the R. S. S. Company, dated June 28th, 1912, for the premises known as Nos. 505 & 507 Lafayette Avenue, and 20 & 22 Kosciusko Street, Borough of Brooklyn, City of New York. Said Ignace I. Apfel hereby retains exclusive control of the said property, and said Rose Amsterdam hereby constitutes and appoints Ignace I. Apfel as her attorney, and in her place and stead to dispose of her interest in the annexed lease, and to do anything and everything in connection with said premises that he may deem proper, hereby ratifying any and all acts done by him.

"Rose Amsterdam hereby agrees to pay one-half of the annual rent mentioned in said lease, a copy of which is hereto annexed, and to comply with all the covenants and condition therein contained. It is understood that each of the parties hereto shall have an equal one-half interest in and to said lease, together with the option to purchase the property therein contained, and that in the event of a re-sale thereof out of the profits to be realized Rose Amsterdam is to receive the sum of Fifteen hundred (\$1500.00) Dollars, being the amount of her investment therein, and after the payment of all the necessary expenses incurred in connection with said property, the balance remaining shall be divided equally between the parties hereto.

"In the presence of

"ROSE AMSTERDAM. [L. s.]

"IGNACE I. APFEL. [L. s.]"

A copy of this agreement was left with plaintiff's sister, a woman of keen business sense, presumably because the plaintiff was to sail for Europe the next day, and her sister had charge of her papers.

The plaintiff says that defendant read this paper to her while she was writing the check for \$1,400; that she thought it was the deed to the property, and that she had no idea that it referred to a lease or that she was buying an interest in the lease.

In the early part of the following October the plaintiff received from the defendant a statement of account containing among other things items of rent paid to the R. S. S. Company, under the lease, and items of expenses for the examination of the title and for recording the deed. On the other side of the account were entered amounts received by the defendant from certain tenants of the premises in question. The total expenses of the property are shown to be \$581.59, and the total receipts \$186, leaving an excess of expenses amounting to \$395.59, for half of which the defendant received a check from the plaintiff. But before getting the check the defendant, on November 15, 1912, found it necessary to write a letter to the plaintiff drawing her attention to the statement of account between them and demanding the payment of the \$197.79. Presumably the plaintiff then consulted the statement of October fifth. If she did so, the fact that thereafter she sent the check for \$197.79, when taken in connection with the other fact that she executed the agreement of July first and then had a copy of it in her possession demonstrates that she knew and approved of the defendant's plan of handling the property.

Much has been made of the fact that the title of this property was not taken in the plaintiff's name. I find nothing in the evidence showing that it was an essential part of their agreement, even if we adopt her version of the transaction. On the contrary, it appears that both plaintiff and defendant expected the property to be sold while the plaintiff was absent in Europe. It was natural in that case that, in view of the plaintiff's great confidence in the defendant's ability, she would allow him to exercise his own judgment as to how the title should be taken.

App. Div.]

First Department, May, 1917.

Furthermore, there is nothing in the receipt for \$100 of June 27, 1912, inconsistent with the defendant's claim that he sold the plaintiff a one-half interest in the premises in question. In this document the defendant acknowledges the receipt of \$100 on account of \$1,500 and of one-half the necessary expenses of obtaining a mortgage and closing title to be paid by the plaintiff for one-half interest in the property. The terms of this receipt are altogether consistent with the written agreement of July 1, 1912, and with the act of the defendant in demanding and of the plaintiff in paying \$197.79 as her share of the expenses of the transaction.

At the commencement of this action the title to the property was still in the R. S. S. Company. After the action was begun the defendant, whose option to repurchase had been extended, paid the R. S. S. Company \$8,000 and took a conveyance in his own name. He then borrowed \$7,500 from the Lawyers' Title Company, secured by a mortgage, and then conveyed the property to a corporation, all of whose stock is owned by defendant.

It thus appears that defendant has absolute control of the property with the power to sell it and that under the agreement of July 1, 1912, between the plaintiff and defendant, the plaintiff is entitled to one-half of the profits that may be realized on a sale together with the return of her \$1,500.

It is apparent that the plaintiff has not made out a case of conversion.

The judgment and order appealed from should be reversed, with costs, and the complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN and SHEARN, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

I dissent. In my opinion, upon the facts necessarily found by the jury as indicated by the verdict, and which are not without support in the evidence, the defendant was clearly guilty of converting plaintiff's money. The original agreement as testified to by plaintiff, and as confirmed by the receipt which defendant had her sign, was that defendant was to buy the Lafayette avenue property and that plain-

tiff was to have "one-half interest in said property." The natural and customary way to invest plaintiff with a half interest in the property would be to have her named as a grantee in the deed, but it is proposed to reverse the judgment and dismiss the complaint upon a mere surmise, unsupported by any evidence, that it was understood between the parties that defendant was to take title in his own name. But even if this was the understanding the defendant did not carry it out except for a brief period. Even now the title does not stand in his name, but in that of some corporation with whom plaintiff has no contractual relation and over which she has no control. It is true that it is said, in a very vague way, that defendant controls this corporation, but I fail to see how that fact helps the plaintiff. As to the supposed authorization to defendant to take a lease of the property instead of a deed the jury were entitled to accept plaintiff's story that she did not understand the nature of the paper which she was induced to sign.

The net result of the whole transaction is that defendant, a lawyer, induced his client to intrust to him \$1,500 wherewith to purchase a piece of property in which she was to have a one-half interest. The title to the property has been put in a corporation with which she has no contract and no relations; her money has been used to purchase the property, and she has no right or interest therein, except perhaps the very problematical and doubtful one of suing the corporation. Even now defendant, although he claims to control the corporation which owns the property, makes no tender of any deed, declaration of trust or other instrument recognizing in a tangible way plaintiff's interest in the property. A clearer case of conversion it would not be easy to find. And yet it is proposed not only to reverse plaintiff's judgment, founded upon a verdict arrived at upon conflicting evidence, but even to dismiss the complaint.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

THE CITY OF NEW YORK, Respondent, v. THE NEW YORK STEAM COMPANY, Appellant.

First Department, May 18, 1917.

Municipal corporations — action by city to recover amount of judgment against it for personal injuries — defect in asphalted street caused by steam — evidence — testimony that water from leaking main maintained by plaintiff came in contact with defendant's steam pipes.

In an action in which the city of New York seeks to recover the amount of a judgment recovered against it for personal injuries resulting from a depression in a street caused by the softening of the asphalt by steam which the plaintiff contends escaped from an underground steam pipe maintained by the defendant, it was error to exclude evidence offered by the defendant to show that the steam was caused by a leak in the plaintiff's water main which allowed water to come in contact with the defendant's steam pipe, thus generating the steam which caused the injury.

It was also error to exclude evidence that an excavation made by the defendant five days after the accident showed that the plaintiff's main was leaking, for the elapse of five days was not sufficient to deprive the testimony of value as evidence.

APPEAL by the defendant, The New York Steam Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of December, 1915, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of December, 1915, denying defendant's motion for a new trial made upon the minutes.

John H. Jackson [*Theodore H. Lord* on the brief], for the appellant.

Charles J. Nehrbas, for the respondent.

DAVIS, J.:

The administratrix of William A. Foley recovered a judgment against the city for \$1,239.31 as damages for the death of her husband. On November 9, 1912, William A. Foley, while driving a truck at the intersection of Broad and Beaver streets, in the city of New York, was thrown from his seat by reason of his wheel going into a depression in the asphalt at that point

and received injuries resulting in his death. The depression in the asphalt was contiguous to a box maintained by defendant in the street for the purpose of enabling it to reach and control a valve in its steam pipe five or six feet below the surface of the street. The asphalt in the vicinity of this box had been so softened by the heat of steam escaping through the box that a depression had been made in the asphalt, leaving the box protruding above the surface several inches. It was the driving over this depression and box that caused the accident to Foley. The action was brought against both the city and the steam company, but it was discontinued as to the steam company, and judgment was recovered against the city. The city notified the steam company to come in and defend, but it refused, and this present action was brought against the steam company to recover the amount of the judgment against the city.

The complaint alleges that defendant maintained a large steam service pipe at the intersection of Broad and Beaver streets and that steam escaping from the steam service pipe through defendant's street box at that point caused a condition in the roadway amounting to a nuisance, resulting in the death of Foley, damages for which the city had to pay; that the unlawful and negligent acts of this defendant caused the death of Foley, which made defendant primarily liable for the damages sustained.

In support of its contention the plaintiff showed that steam issued from the street box, and it was conceded that this steam caused the softening of the asphalt. Beyond this, however, there was little evidence to show that the steam came from defendant's pipe.

It was shown by competent evidence that the steam in question could have been caused by water coming into contact with defendant's hot pipes, and that it would come to the surface through defendant's street box. It was also shown that the plaintiff maintained at the point in question a twelve-inch high-pressure water main which lay about fifteen inches above and about eighteen inches to the north of defendant's steam pipe. The defendant offered proof to show that the water main had leaked, and that the water therefrom coming in contact

App. Div.]

First Department, May, 1917.

with the pipe of the defendant generated the steam which caused the softening of the asphalt. On this point the defendant proved that it made an excavation at the point in question five days after the accident and found that the plaintiff's water main was leaking, and that water was coming from the north and west. This testimony was stricken out upon objection of the plaintiff and exception taken, and further efforts of the defendant to show the condition of the plaintiff's water main were equally unavailing. We think it was error to reject this testimony. The lapse of five days between the date of the accident and the date of the examination by defendant of the plaintiff's water main is not sufficient to deprive this testimony of value as evidence. Had the defendant been allowed to show the actual condition of plaintiff's water main, the fact that it was leaking, and the fact that the surrounding earth was full of water reaching up to the defendant's steam pipe, the jury might well have inferred that the defendant was not responsible for the steam that escaped from the street box.

The judgment and order are reversed and new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and SHEARN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

WILLIAM F. HAMILTON, Respondent, v. LEON H. ROUSE, as President of TYPOGRAPHICAL UNION No. 6, an Unincorporated Association Consisting of Seven or More Persons, and Others, Appellants.

First Department, May 18, 1917.

Pleading — complaint — action against unincorporated labor union founded upon alleged violation of by-laws and constitution — priority of members as respects employment and discharge — complaint stating cause of action.

Action against the president of Typographical Union No. 6, an unincorporated association consisting of seven or more persons, to recover damages to the plaintiff, a member, caused by the fact that the action

APP. DIV.—VOL. CLXXVIII. 6

of the executive committee of the union, which is alleged to be illegal and contrary to the constitution of the union, deprived the plaintiff of his position. The complaint in substance alleged that under the constitution of the international and local unions there was a priority law by which when compositors were discharged by reason of a necessary decrease in the force employed in printing offices, the men who were employed first were to be discharged last and the men who were discharged last were to be the first to be re-employed. He further alleged that while he was in the employ of a printing company, the controlling interest thereof was purchased by another publisher and that the local typographical unions or chapels, which had priority agreements with both of said publishers, met and passed resolutions alleged to be contrary to the constitution, as a result of which the employees of the purchasing company obtained a priority over the employees of the company by which the plaintiff had been employed, as the result of which he lost his position which was taken by an employee of the purchasing company. Complaint examined, and *held*, to state a cause of action and that a demurrer thereto was properly overruled.

APPEAL by the defendants, Leon H. Rouse, as president, and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of January, 1917, overruling their demurrer to the complaint.

Alfred J. Talley, for the appellants.

Vincent P. Donihee, for the respondent.

DAVIS, J.:

The grounds of the demurrer are that there is a defect of parties defendant, and also that the complaint fails to state facts sufficient to constitute a cause of action.

The defendant Rouse is president of Typographical Union No. 6, an unincorporated association consisting of more than seven members.

The plaintiff is a member of the local union No. 6. This local union is organized under a charter of the International Typographical Union of North America. All the members of the local union are members of the International union. The latter has a constitution which is the organic law binding on the subordinate local unions, as well as on all of its members. Under section 121 of the general laws of the International union there

App. Div.]

First Department, May, 1917.

exists what is known as a priority law. Under this priority law members of the union could be discharged only for incompetency, neglect of duty, violations of office rules or of the laws of the chapel or union, or in order to decrease the force employed in any printing office. Under this priority law in case of a decrease in the force, compositors were discharged in inverse order to that in which they were employed, and in case of an increase in the force the persons so discharged are reinstated in the reverse order to that in which they were discharged. That is, the men who were employed first were discharged last and the men who were discharged last were taken on first.

Under the constitution of Typographical Union No. 6, in every printing office where three or more members of that union were employed, those members were required to form themselves into a chapel and elect a chairman and a secretary.

The plaintiff was employed in the Sun Printing and Publishing Association's shop. This association was a member of the Publishers Association of New York City which has a working agreement with the Typographical Union No. 6, whereby members of that association employed in their printing offices only compositors who are members of Typographical Union No. 6. It was provided in this agreement between the Publishers Association and Typographical Union No. 6 that foremen of printing offices have the right to employ help and may discharge (1) for incompetency, (2) for neglect of duty, (3) for violation of office rules or of laws of the chapel or union, and (4) to decrease the force, such decrease to be accomplished by discharging first the person or persons last employed; and should there be an increase in the force the persons displaced through such cause should be reinstated in the reverse order in which they were discharged before other help may be employed.

In some printing offices there were departments and when the union recognized those departments this priority law would apply to each department, and where there were no departments in the printing office the priority law applied to the whole printing office as a unit.

It appears that at the times mentioned in the complaint the New York Press Company, Limited, maintained a printing office in the city of New York, publishing a newspaper known

as *The Press*, and that Frank A. Munsey had the controlling stock interest in the New York Press Company, Limited. It also appears that the Typographical Union No. 6 had organized their chapel in the printing office of the New York Press Company, Limited, and that its chapel maintained a priority list showing the priority standing of the various members of the chapel, and a similar chapel of Typographical Union No. 6 was in existence in the *Sun* office.

The complaint alleges that Frank A. Munsey announced that he had purchased the controlling stock interest in the Sun Printing and Publishing Association, whereupon during a recess of the Typographical Union No. 6 its executive committee authorized to act during recess, without notice to the plaintiff, made an order requiring the *Sun* chapel and the *Press* chapel to appoint a joint committee to prepare a joint priority list of the members of the *Sun* chapel and the *Press* chapel. Such committees were appointed, although the *Sun* chapel did so under protest. The members of the two committees prepared a joint priority list of the members of the *Sun* chapel and the *Press* chapel on a departmental basis. The *Sun* chapel did this also under protest. The result of this action was to give the former employees of the Press Company a position on the joint priority list superior to that of the plaintiff, with the result that the plaintiff lost his position and it was taken by some member of the *Press* chapel.

It appears that the Sun Printing Company employed about fifty-five compositors in its operators' department and before employing the members of the New York *Press* chapel the plaintiff was in such a position on the priority list that there were seven members of the *Sun* chapel who would have to be discharged before he was discharged, but when the Sun Printing Company employed the members of the Press Company's chapel in accordance with the new joint priority list made pursuant to the order of the executive committee of the union, the plaintiff was discharged because there were sufficient former employees of the New York Press Company on the joint list with a priority superior to the plaintiff's to render the services of the plaintiff unnecessary in a department employing fifty-five compositors.

App. Div.]

First Department, May, 1917.

The defendants other than Rouse are former members of the *Press* chapel and were employed in the *Sun* office solely by reason of the order of the executive committee establishing a joint priority list.

The plaintiff alleges that this action of the executive committee was illegal and contrary to the laws and constitution of the union, both local and international. The first ground of the illegality is alleged to be that the members of the *Press* Company's chapel obtained employment with the *Sun* Company not by reason of priority of employment with the *Sun* Company but by reason of priority of employment with the *Press* Company; *second*, that it is not contemplated that one member of the International Typographical Union should take the place of another member of that union except where such member has been discharged for incompetency, neglect of duty, violation of office rules or of laws of the chapel or union, or upon the voluntary resignation of such member from employment in a printing office. The plaintiff claims that he was discharged for none of these reasons but by the employment of a member of another chapel because of his priority in that other chapel. The plaintiff further alleges that the act of the executive committee was in violation of the contract between him and his union.

The action of the executive committee in approving the joint priority list upon the appeal of the plaintiff was reviewed by the union and sustained. There was a further appeal to the executive council and the action of the subordinate body was sustained. There was also an appeal to the convention which also sustained the action of the subordinate body. The plaintiff alleges that he has exhausted all his remedies under the constitution of the union, and he brings this action for the purpose of annulling and setting aside the order of the executive committee of Typographical Union No. 6 and the joint priority list made in conformity with their order, and to have his name placed on the priority list of the employees of the *Sun* chapel in the same position it would have been had the order of the executive committee not been made. He also asks incidentally for damages which he has suffered.

We are of opinion that the plaintiff has made a good complaint and that the order overruling the demurrer should be

First Department, May, 1917.

[Vol. 178.]

affirmed. The other ground of the demurrer that there is a defect of parties defendant is without merit.

The order overruling the demurrer is affirmed, with ten dollars costs and disbursements, with leave to defendants to withdraw demurrer and to answer on payment of costs in this court and at the Special Term.

CLARKE, P. J., LAUGHLIN, SCOTT and SHEARN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to defendants to withdraw demurrer and to answer on payment of costs.

SAMUEL T. GOLDBERG and ISAAC GOLDBERG, Respondents,
v. POPULAR PICTURES CORPORATION, Appellant, Impleaded
with LONDON & LANCASHIRE INDEMNITY COMPANY OF
AMERICA, Defendant.

SAMUEL T. GOLDBERG and ISAAC GOLDBERG, Respondents,
v. LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA,
Appellant, Impleaded with POPULAR PICTURES CORPORATION,
Defendant.

First Department, May 18, 1917.

Contract — agreement relating to manufacture and exhibit of moving picture films construed — action on bond of surety company insuring due performance by exhibitor — defenses — violation of contract by plaintiff by selling same film to other exhibitor — offset — moneys received from other exhibitor.

The plaintiff agreed to manufacture and deliver to the defendant a moving picture film which the defendant was to have the sole right to exhibit in the United States and Canada and on the delivery of the film the defendant was to advance to the plaintiff the actual cost of manufacture, not to exceed \$14,000. The defendant also agreed to pay to the plaintiff fifty per cent of its gross receipts from the exhibition of the film, but the plaintiff was not to be entitled to said percentage until the defendant had first reimbursed itself out of the receipts for the manufacturing cost advanced to the plaintiff on delivery of the film, so that the original cost of manufacture was ultimately to be borne solely by the plaintiff out of its share of the receipts of the defendant. To secure performance the defendant gave a bond of the defendant surety company, upon which this action is based, which recited and referred to the aforesaid agreement and provided that nothing therein contained shall

App. Div.]

First Department, May, 1917.

modify the right of the defendant to repayment of the advances made to the plaintiff out of the moneys realized by the defendant on said production. The answer of the defendants alleged that acceptance of the film was refused because the plaintiff had delivered to another exhibitor substantially the same film under an agreement by which the plaintiff was to receive from the other exhibitor a percentage of its receipts from the production of the picture in the United States and Canada and that it had actually received certain sums of money from said exhibitor.

Held, that the obligation of the defendant surety company to pay arose, not only when there was an acceptance of the film manufactured by the plaintiff, but also when the plaintiff in other respects did what it was required to do under the contract, and that hence the special defenses aforesaid are good and the plaintiff is not entitled to recover the full amount of \$14,000, as the moneys received from the other exhibitor should be offset against the claim.

APPEAL in each case by the defendants, Popular Pictures Corporation and London & Lancashire Indemnity Company of America, from orders of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of April, 1917, granting the motions of the plaintiffs in each case for judgment upon the special defense pleaded in the answers of the defendants.

Milton M. Goldsmith, for the appellants.

Gustavus A. Rogers, for the respondents.

DAVIS, J.:

On April 14, 1916, plaintiffs and the defendant Popular Pictures Corporation entered into a written contract whereby the plaintiffs agreed to manufacture and furnish to said defendant on or before June 22, 1916, a feature motion picture of not less than 4,500 feet. The thing to be furnished by plaintiffs was an original negative and a sample print thereof. On its part said defendant agreed that for the right to handle, that is to rent, exhibit or otherwise use these motion picture films in the United States and Canada, the defendant would pay to the plaintiffs upon the receipt of the negative and sample print the actual cost of manufacturing the motion picture production, including overhead charges, all not to exceed \$14,000. In addition to the \$14,000, the defendant agreed to pay the plain-

First Department, May, 1917.

[Vol. 178.]

tiffs, for the privilege of handling the production, fifty per cent of the gross receipts of the production and use of the motion pictures. However, the plaintiffs were to receive no part of these gross receipts until the defendant Popular Pictures Corporation had been reimbursed therefrom for the advance of the \$14,000 to the plaintiffs. In other words, the original cost of the production was to be borne ultimately and solely by the plaintiffs out of their fifty per cent of the gross receipts. Although the defendant was to advance the \$14,000, it was not to be charged with any part of the expense of manufacture.

Under paragraph 10 of the contract the defendant Popular Pictures Corporation agreed to furnish a surety company bond in the sum of \$14,000 running to the plaintiffs "that it will make the payments specified herein to be made by it, and perform the conditions of this contract to be performed by it in respect to the payment of the said sum of \$14,000 before mentioned." The giving of this bond was to depend upon the plaintiffs first depositing to their own credit \$14,000 to be held for the sole purpose of making the motion picture production in question.

The bond was given as agreed and was executed by the Popular Pictures Corporation as principal and the defendant indemnity company as surety. After reciting the making of the agreement referred to and the provision as to the payment of the \$14,000 by the Popular Pictures Corporation, the bond provides: "Now the condition of the above obligation is such that if the said Popular Pictures Corporation, its successors or assigns, shall well and truly make the payment of the cost of the said photo play up to and inclusive of the sum of Fourteen Thousand (\$14,000) Dollars at the time and in manner provided to be made by the terms of said contract, then this obligation is to be void; otherwise to be and remain in full force."

In the 17th paragraph of the agreement provision is made for certain changes in the method of distributing the pictures and a consequent change in the proportion of gross receipts to be paid, and the paragraph ends: "But nothing herein contained shall alter or modify in any way the agreement and obligation of the distributor to pay in advance on account of future receipts to the manufacturers, the entire cost of such production

App. Div.]

First Department, May, 1917.

up to the sum of Fourteen thousand (\$14,000) Dollars for said production at the time of delivery, as hereinbefore set forth, and the right of the distributor to repayment of such advance out of moneys realized on said production."

The latter provision makes it clear that the plaintiffs were ultimately to bear the whole expense of manufacturing the film.

The action is brought on the bond to recover \$14,000. The plaintiffs stipulated that the action is brought upon the bond annexed to the complaint, and that the cause of action is to recover upon the condition in the bond. The complaint sets forth the agreement between the plaintiffs and the defendant Popular Pictures Corporation, the execution and delivery of the bond by both defendants, the fact that plaintiffs prior to June 22, 1916, made and produced a photo play at a cost of \$14,000 and over, and due performance by plaintiffs of the conditions of the contract to be performed by them. The complaint also alleges that prior to June 22, 1916, the plaintiffs delivered to the defendant Popular Pictures Corporation the original negative and sample prints of said photo play as required by the contract, but that defendant Popular Pictures Corporation refused to accept delivery of the photo play and has refused to distribute the same as provided in the agreement. It is then alleged that after tender of delivery of the photo play and the negative and sample prints thereof, the plaintiffs demanded from both defendants the payment of \$14,000 as provided in the bond; that payment was refused, to the damage of plaintiffs in the sum of \$14,000.

The defendants served separate answers. Each answer contains a separate and distinct defense to the claim of \$14,000. The substance of the Popular Pictures Corporation's defense, upon which judgment has been rendered for the plaintiffs, is that subsequent to the tender of the photo picture to the defendant Popular Pictures Corporation, the plaintiffs revised and reconstructed the picture and delivered it to another distributor, the Mutual Film Corporation, under an agreement whereby plaintiffs were to receive sixty per cent of the gross receipts from the use of said revised picture in the United States and Canada; that plaintiffs actually received on account thereof from said Mutual Film Corporation \$7,200; that plaintiffs have

realized \$1,300 through selling the right to produce the film in Russia, Australia and New Zealand, and are about to sell the English rights for the sum of \$1,500, and that the exhibiting rights in the unsold territory are worth not less than \$1,500, all of which is more than the proper cost of the picture. Defendant further alleges in this defense that the returns from the Mutual Film Corporation which will become due to the plaintiffs will not be less than \$9,000 in addition to the \$7,200 already received by plaintiffs, and that the contract made between plaintiffs and the Mutual Film Corporation was made without the consent of defendant, and that all of the terms of said contract are not known to defendant. The answer of the indemnity corporation contains substantially the same defense.

The learned court at Special Term took the view that this defense was insufficient in law, and for that reason ordered judgment for the plaintiffs upon that defense in each answer, and the appeals are from those two orders.

The bond upon which the action is brought does not insure the performance of all the provisions of the contract between the parties thereto. The bond has reference only to the payment of the \$14,000 "at the time and in manner provided to be made by the terms of said contract;" that is, the surety agrees to pay the \$14,000 in case the principal does not pay. The surety's obligation to pay the \$14,000 arises only when the plaintiffs have fully performed and the Popular Pictures Corporation has failed to pay the \$14,000. The defendant indemnity corporation claims that it is obligated to pay only when the photo picture is accepted and the Popular Pictures Corporation has failed to pay the \$14,000. If this were so the complaint would have to be dismissed, as there was no acceptance by the Popular Pictures Corporation.

I think the surety's obligation to pay arose not only when there was an acceptance of the film, but also when the plaintiffs made a good tender of delivery, and in other respects did all that was required of them under the contract and there was a refusal to accept. But the plaintiffs claim to be entitled to recover the full sum of \$14,000 as the cost of the photo picture, notwithstanding the fact that they have received revenues arising from the exhibition of the film in the United States

App. Div.]

First Department, May, 1917.

and Canada by another distributing company. The contract between the plaintiffs and the defendant distributing corporation never contemplated such a result. Under that contract the \$14,000 was to be paid ultimately out of plaintiffs' share of the gross receipts. They were to receive nothing on account of gross receipts until the distributor had been reimbursed out of plaintiffs' share of the gross receipts. Of course, if, as was not probable, there should be no gross receipts, the \$14,000 expense of manufacturing would be upon the distributor. The clear meaning of the contract is that the defendant Popular Pictures Corporation must ultimately pay that part of the \$14,000 which is not canceled by plaintiffs' share of the gross receipts. And the bond follows this line of liability, and the surety must respond to the plaintiffs only for such part of the \$14,000 as is not canceled by plaintiffs' share of the gross receipts, it being the intention that plaintiffs should pay for the cost of making the pictures out of the revenues from its exhibition and sale. The purpose of the bond is to insure to the plaintiffs revenues from the exhibition of the film in the United States and Canada sufficient to pay the cost of manufacturing the picture. The defendants undertake to pay the difference between the cost of manufacturing (\$14,000) and the amount of gross receipts derived from the picture in the United States and Canada. This difference is the only damage suffered by the plaintiffs for which under this bond the defendants agreed to hold themselves liable. If this defense is established the plaintiffs' damage does not amount to \$14,000. It is true they have received no receipts from the defendant Popular Pictures Corporation, but that fact is not important if in fact plaintiffs have received receipts from other sources for the use of the film in the same territory, that is, the United States and Canada. The defendants are liable under the bond only for the damages actually suffered by plaintiffs. It follows, therefore, that they have the right to offset against the claim of \$14,000 such sums as the plaintiffs have received from the renting of the film to the Mutual Film Corporation for the use of it in the United States and Canada, but not elsewhere. It was never contemplated that the plaintiffs should have \$14,000 in addition to receipts from the exhibition of the picture.

For these reasons I think the defenses are good and that the two orders of the Special Term should be reversed, with ten dollars costs and disbursements, and the motions for judgment denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SCOTT and SHEARN, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements, and motions denied, with ten dollars costs.

MARION HAYWARD, Respondent, v. IRVING HAYWARD,
Appellant.

First Department, May 4, 1917.

Judgment — execution — levy against accruing salary unauthorized — garnishment — third party order for examination in proceedings supplementary to execution — restraining disposition of property pending examination.

Although a fund representing salary earned, whether in the possession of the employer or of the employee, or of a third person, is not exempt from levy under execution and may be seized wherever found, a levy may not be made against the employer when the salary is not only not due but is only partially earned.

The only way to reach an accruing salary is by garnishment proceedings under section 1891 of the Code of Civil Procedure.

A third party order in supplementary proceedings may be issued against an employer directing an examination concerning its alleged indebtedness, and, pending such examination, restraining the disposition of any property belonging to the judgment debtor.

APPEAL by the defendant, Irving Hayward, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of February, 1917, denying defendant's motion to vacate a sheriff's levy, to vacate an order for the examination of a third party, and to compel a third party to pay over money.

I. Maurice Wormser, for the appellant.

Francis C. Nickerson, for the respondent.

App. Div.]

First Department, May, 1917.

SHEARN, J.:

This is an appeal from an order of the Special Term denying defendant's motion to vacate and set aside an attempted levy under an execution upon a weekly salary payable to the defendant by the Palace Operating Corporation, pursuant to a written contract entered into by the defendant under the name of Alan Brooks & Company and the Palace Operating Corporation for the production of a vaudeville sketch by the defendant, assisted by three other persons provided by the defendant, for which said "Alan Brooks & Company" were to be paid a salary of \$665 upon the conclusion of the final performance. The contract was made on January 13, 1917, and its term was one week commencing on January 15, 1917. Judgment for \$1,075 was entered in favor of the plaintiff and against the defendant in this action on January 20, 1917, and execution thereupon was issued to the sheriff of the county of New York upon the same day, and on that day the sheriff caused a notice of levy to be served on the Palace Operating Corporation. Subsequently a third party order in proceedings supplementary to execution was issued directing the Palace Operating Corporation to appear and be examined concerning the alleged fund under its control, and the order restrained the Palace Operating Corporation from transferring or otherwise disposing of the alleged fund. The plaintiff justifies the levy and the order appealed from by asserting that salary earned is not exempt from execution, and that the only purpose of the provisions of section 1391 of the Code for the garnishment of salary is to provide a means of reaching salaries to be earned in the future by impressing a continuing lien thereon to the extent authorized until the judgment is satisfied. It is quite true that a fund representing a salary earned, whether in the possession of the employer or of the employee, or of a third person, is not exempt from levy under execution, and that such fund may be seized wherever found. But this is no such case. When the execution was issued there was no fund belonging to the defendant representing salary earned in the hands of the Palace Operating Corporation. The salary was not only not due at that time but was only partially earned. There is only one way provided by statute for reach-

ing an accruing salary, and that is the means provided in section 1391 of the Code; upon the return of an execution unsatisfied, an order may be obtained garnisheeing a percentage of salary due or to become due. If an unpaid salary, due or to become due, could be wholly seized by a judgment creditor under an execution in the manner here attempted there would be no use or sense in the elaborate provisions made in the Code for an order that an execution issue against salary, which execution shall become a lien on salary due or to become due to an amount not to exceed ten per centum thereof.

So far as concerns the order requiring the Palace Operating Corporation to be examined concerning its alleged indebtedness and, pending such examination, restraining its disposition of any property belonging to the judgment debtor, the Special Term was right in refusing to vacate the order.

The order must be reversed and the motion granted to the extent of setting aside an attempted levy against salary.

CLARKE, P. J., LAUGHLIN, DOWLING and DAVIS, JJ., concurred.

Order reversed and motion granted to extent stated in opinion.

SYLVIE MONTEGUT and JEANNE D'ETREILLIS, Doing Business as BOUE SOEURS, Respondents, v. HICKSON, INC., Appellant.

First Department, May 4, 1917.

Equity — injunction — obtaining trade or business by fraud and deception.

Where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect the honest trader and restrain a dishonest one from carrying out his scheme.

Hence, where a dealer in gowns procures a person to misrepresent herself as a private customer and purchase gowns from another dealer of exclusive designs, and removes therefrom the trade mark and exhibits such gowns and copies thereof to its customers, representing them to be its own importation, not created by the dealer from which the original was purchased, it should be enjoined from exhibiting and selling such gowns.

App. Div.]

First Department, May, 1917.

Such dealer, however, has a legal right to copy and to sell as its own creations the exclusive models designed by another, if the models or an inspection thereof are procured by fair means.

CLARKE, P. J., and DAVIS, J., dissented, with opinion.

APPEAL by the defendant, Hickson, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of December, 1916, granting plaintiffs' motion for judgment on the pleadings consisting of the complaint and a demurrer thereto.

Sidney J. Loeb, for the appellant.

Bert Cohen, for the respondents.

SHEARN, J.:

In the case of *Burrow v. Marceau* (124 App. Div. 665) Mr. Justice INGRAHAM, writing for a unanimous court, said: "There is no hard and fast rule by which it can be determined when the court will interfere by injunction to prevent what is practically a fraud upon a person engaged in business by the unfair methods of competition. Each case must depend upon its own facts, but where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect the honest trader and restrain a dishonest one from carrying out his scheme." Although the facts in that case are wholly dissimilar from the facts in the case at bar, the principle thus broadly and tersely stated is one which should be decisive of this case. In the opinion of Mr. Justice DAVIS it is said: "Nor do I think that the deception by means of which the defendant obtained possession of plaintiffs' models affects the question." To my mind, under the principle correctly laid down in the *Burrow Case* (*supra*), and under the law of unfair competition as generally understood, the deception employed is the very heart of the matter. It must be conceded that if the defendant obtained possession of plaintiffs' models by bribing one of plaintiffs' employees to furnish surreptitiously an opportunity to copy them, the

means employed would constitute unfair trade. (*Tabor v. Hoffman*, 118 N. Y. 31.) While the case supposed involves a violation of the duties growing out of the relation of master and servant, the resort to bribery is not condemned because it causes the servant to violate his duty to his master but because it is an unfair and dishonest trade practice. I agree that the defendant has a legal right to copy and to sell as its own creations the exclusive models designed by the plaintiffs if the models or an inspection of the models are procured by fair means, but I deny the right of the defendant to obtain plaintiffs' trade by resort to fraud and deception practiced upon the plaintiffs at the instigation and hiring of the defendant. Paraphrasing the opinion of Judge VANN in *Tabor v. Hoffman* (*supra*), because an inspection of or possession of plaintiffs' models may be possible by fair means, it does not justify obtaining the same by unfair means. Here the defendant not only obtained possession of the exclusive artistic creations of the plaintiffs by fraud and deception, but physically removed therefrom the plaintiffs' trade mark, exhibited the gowns to its customers and represented them to be its own importation created by persons other than the plaintiffs. The natural and intended result was to divert from the plaintiffs and appropriate by the defendant trade and custom that would otherwise go to the plaintiffs, for if the styles were popular and could only be obtained at the plaintiffs' establishment the defendant could only obtain the custom of persons seeking these styles by obtaining the models and copying them. For this express purpose, and knowing that plaintiffs would only sell copies of these models to *bona fide* customers purchasing for personal use, the defendant conceived and put into effect its scheme of imposition and fraud upon the plaintiffs by procuring a person to misrepresent herself as a private customer, buying the gowns to wear herself, and thus misled and deceived the plaintiffs into turning over their models to the defendant. We are not concerned with the fraud practiced by the defendant on its own customers except in so far as it tends to brand the entire transaction and trade methods of the defendant as dishonest and fraudulent. While the relief asked for in the complaint is too broad, in my opinion plaintiffs are entitled to a judgment, assuming the

App. Div.]

First Department, May, 1917.

allegations in the complaint to be true, enjoining the defendant from exhibiting and selling gowns and capes which are copies of those obtained from the plaintiffs by means of fraud and deception, and, therefore, the order granting plaintiffs' motion for judgment on the pleadings should be affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw the demurrer and to answer upon payment of costs in this court and in the court below.

LAUGHLIN and DOWLING, JJ., concurred; CLARKE, P. J., and DAVIS, J., dissented.

DAVIS, J. (dissenting):

The defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. Upon these pleadings the court granted plaintiffs' motion for judgment.

The complaint alleges that the plaintiffs are engaged in business as high-grade dressmakers at 13 West Fifty-sixth street, New York city, and at 9 Rue de la Paix, Paris, under the name of "Boue Soeurs," with the most exclusive clientele; that the establishment of the plaintiffs has an international and enviable reputation for the creation of exclusive models and styles; that these models and styles are created in Paris at great expense and after much experimenting; that they are brought by plaintiffs to their establishment in New York city, where they exhibit them to their patrons as their own creations and exclusive models; that these models consist of gowns, capes and apparel and bear the mark "Boue Soeurs," thereby insuring exclusiveness of design and the highest quality of material.

The complaint proceeds to allege that defendant is a dealer in gowns at 661 Fifth avenue, New York city, and that the defendant, well knowing the reputation of the plaintiffs for creating exclusive models which become the standard for prevailing styles, for the purpose of unlawfully securing to itself the benefits and advantages incident to the exhibition and sale of the artistic creations of the plaintiffs by palming off the same as its own importations, in October, 1916, caused certain

of the plaintiffs' own exclusive gowns and a cape to be purchased from the plaintiffs by a lady who represented herself to be a private customer, buying the gowns for her personal use, which representations were believed by the plaintiffs to be true and relied upon by them although the said representations were false; that the said gowns and cape were delivered to the said purchaser, who in turn delivered them to the defendant, Hickson, Inc.; that thereafter the defendant, Hickson, Inc., took out from said gowns the marks "Boue Soeurs" and exhibited and are exhibiting the gowns and cape, and copies thereof, to its customers, and represented and are representing the gowns and cape to be their own importations and to be the creations of certain alleged dressmakers in Paris, France, other than the plaintiffs, and said Hickson, Inc., exhibited and offered to sell and is continuing to exhibit and offering to sell to its customers said gowns and cape and copies thereof, thereby deceiving the public, injuring the reputation of the plaintiffs' firm, causing it to lose sales and making customers of the firm suspicious of plaintiffs' representations, all to the plaintiffs' great damage.

Plaintiffs then demand judgment restraining defendant from exhibiting and selling said gowns and cape or copies thereof and from making any representation as to the origin thereof except that they are the creation and styles of the plaintiffs and for \$25,000 damages.

The plaintiffs claim that the defendant is engaging in unfair competition and dishonest trade methods causing direct injury to plaintiffs' business.

The question of patent or copyright is not involved in this case, as the plaintiffs' models are neither copyrighted nor patented.

The plaintiffs ask the court to enjoin their competitor, the defendant, from exhibiting and selling those models and designs and copies thereof as its own productions, it having obtained possession of them for that purpose by false representations as to the purpose for which it bought them.

This is not the usual case of misrepresentation where a person offers for sale his own creations under the marks or labels of another. Here the defendant removed from the purchased

App. Div.]

First Department, May, 1917.

models every mark serving to identify them as those of the plaintiffs. It is a case of copying and selling the creations of the plaintiffs by representing them to be the product of the defendant's own invention or that of persons other than the plaintiffs.

We may assume that the plaintiffs sell their models and copies thereof to the public generally, endeavoring as far as possible to avoid selling them to their competitors. When once sold the plaintiffs retained no right to control the use to be made of them. If the purchaser chooses to represent himself as the creator of the models and sell copies of them to the public, it is an act which a court of equity will not restrain. While the defendant's act of appropriating the ideas and work of the plaintiffs may be unreservedly condemned in its moral aspect, it is not an act which the courts have thus far regarded as unfair competition. Nor do I think that the deception by means of which the defendant obtained possession of plaintiffs' models affects the question.

If the charge of deception as alleged be true, and we assume it to be true for the purpose of this appeal, while it reflects seriously upon the character of the defendant as a merchant, the deception practiced does not affect its right to full control over the models it bought, including the selling of copies, the suppressing of the fact that they are the creations of the plaintiffs and the holding of them out as the product of the defendant's own taste and experience.

For these reasons the order appealed from should be reversed and the motion for judgment on the pleadings denied.

CLARKE, P. J., concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs.

GEORGE COLON & COMPANY, Appellant, v. SARAH B. SMITH,
Respondent, Impleaded with MICHAEL J. FITZGERALD,
Defendant.

First Department, May 18, 1917.

Liens — mechanic's lien — failure to file within ninety days — when lien may not be filed for restoring sidewalk in connection with contract.

Where, in an action by a subcontractor for the foreclosure of a mechanic's lien under a contract to excavate earth and rock, it appears that the excavation was completed more than ninety days prior to the filing of the lien, and that work performed by the plaintiff in restoring sidewalks within the ninety days before filing the lien constituted no part of the improvement made upon the land for the benefit of the owner, the complaint should be dismissed.

The only work for which a lien may be filed is the work which the contractor is engaged to perform in improving the premises.

The contract being merely to excavate, and the interference with the walk having been made for the convenience of the contractor, the duty to restore the walk, whether implied or expressed, constituted no part of the improvement made upon the land for the benefit of the owner for which a lien could be filed either by a contractor or by a subcontractor. SMITH and PAGE, JJ., dissented, with opinion.

APPEAL by the plaintiff, George Colon & Company, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of Bronx on the 3d day of August, 1916, upon the decision of the court dismissing the complaint after a trial at the Bronx Special Term.

Mortimer M. Menken, for the appellant.

Alexander Thain [*Lilian Herbert Andrews* with him on the brief], for the respondent Sarah B. Smith.

LAUGHLIN, J.:

I am of opinion that the judgment in favor of the respondent is right and should be affirmed. The respondent Smith was the owner of premises on the southeast corner of Merriam avenue and University avenue (formerly Aqueduct avenue), borough of The Bronx, New York city. In the month of March, 1913, she entered into a verbal contract with the defendant Fitzgerald for the excavation of the lot with a view

App. Div.]

First Department, May, 1917.

to building an apartment house thereon. Fitzgerald was called as a witness by the plaintiff, and the only evidence with respect to the contract is his testimony which, so far as material to the issue presented for decision, is to the effect that it was agreed between him and the owner that he should excavate the earth and rock according to architects' plans that had been filed with the department of buildings and that he was to receive for his services eighty-five cents per cubic yard for earth and one dollar and ninety cents per cubic yard for rock excavation.

He entered upon and continued in the performance of the work until the 22d of April, 1913, at which time, by a contract resting in parol, he sublet the remaining work to the plaintiff at the same rate, but for an additional consideration.

The owner paid Fitzgerald \$1,900 on account of the work which he claims covered the work performed prior to the subletting. The president of the plaintiff testified that his company "continued excavating the premises until the work was complete." On completion the further sum of \$3,536.30 became due and owing from the owner to Fitzgerald, and from him to the plaintiff for this work, no part of which has been paid. The plaintiff, however, claims that the work performed by Fitzgerald before subletting the unfinished work to it would not amount to \$1,900, and on that theory the plaintiff's claim was for more than the balance owing from the owner. Plaintiff's lien was filed on the 4th of April, 1914.

The complaint was dismissed on the ground that the lien was not filed "within ninety days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished," as required by section 10 of the Lien Law. (Consol. Laws, chap. 33; Laws of 1909, chap. 38).*

One Hess, who was employed and called by the plaintiff, testified in answer to a question asked by the court, that the plaintiff considered that it had finished this excavation work in the spring of 1913.

It appears that on the 23d of May, 1913, the owner entered

* Since amd. by Laws of 1916, chap. 507.—[REP.]

into a contract in writing with the plaintiff "to build the foundation stone walls and put in the concrete footings" for an apartment house, and plaintiff agreed to complete the work in less than eight working days. The testimony of Fitzgerald, which is uncontroverted, shows that about two days prior to the date of that contract, he introduced Hess, representing the plaintiff, to the owner with a view to obtaining for plaintiff the contract for the foundation walls, and that at that time the excavation was about completed and ready for the construction of the foundation walls. Notwithstanding the fact that the plaintiff by its agreement with the owner contracted to complete its contract work in less than eight days from the twenty-third day of May, it did not commence the work until the twelfth day of June, and then did not finish it until the first of July, when, according to the testimony of Colon, the president of the plaintiff, the work was practically completed. The owner testified in substance that she had negotiated a loan upon the theory that the building would be completed and ready for occupancy by tenants in the fall, and that the delay of the plaintiff in performing its contract for the erection of the foundation rendered this impossible, and that for that reason she was unable to procure the loan and was obliged to abandon further work on the building. There can be no doubt on this and other evidence that the earth and rock excavation covered by the contract between the owner and Fitzgerald and sublet in part to the plaintiff was completed more than ninety days prior to the filing of the lien.

The work claimed to have been done within ninety days of the filing of the lien relates to certain work done on the 7th of January, 1914, consisting of the removal of rock which when excavated was placed on adjoining premises, and to the restoration of the sidewalks, and to the removal of some loose stones from the cellar. The president of the plaintiff testified that when his company entered upon the performance of the work of excavating the earth and rock it continued in the performance of that work until it was completed; and thereupon the court asked when the excavation was completed, and he answered that it was completed in January; whereupon the court, evidently in view of the fact that all of the

App. Div.]

First Department, May, 1917.

evidence received prior to that time tended to show that the work of excavating was completed at about the time the plaintiff entered upon the performance of the construction of the foundation, asked, "What?" to which the witness answered "In January, 1914, removing the rock from adjoining premises, fixed the sidewalks." The witness also testified that in the month of November or December, 1913, the owner insisted that the rock should be removed from the adjoining premises, and that rubbish should be removed, and the sidewalks and curb fixed; and that payment of the balance owing on the contract for excavating would not be made until that was done; and that thereupon his company cleaned out the cellar, removed the rock from the adjoining premises and cleaned or repaired or restored—he does not specifically say which—the sidewalks; and that thereafter and in the latter part of December the owner still complained "about sidewalks, was in bad condition, and fragments" and claimed that these things were part of the excavation contract. Hess was asked what work was done on the 7th of January, 1914, in connection with this claim; and he answered "removing the boulders and building stone from the adjoining property, also the loose stones in the cellar, and fixing up the sidewalk;" and that he saw big stones broken up so that they could be put on a wagon and carted away, and saw ten or twelve loads taken away that day. This is the only evidence with respect to the work done within ninety days of the filing of the lien. In so far as it relates to the removal of loose stones from the cellar and of the boulders or building stone from the adjoining premises it is quite clear, I think, that the plaintiff did not sustain the burden of proof, for the president of the plaintiff, who gave some testimony on this subject, had already testified that the rock had been removed and the cellar cleaned out prior to that time; and by letters under date of July 1, September 9, October 7, October 13 and October 16, 1913, written by the plaintiff to the owner the plaintiff insisted that it had completed all this work; and by the letter of September 9, 1913, it claimed that the cellar had been cleaned up in proper shape, and that "the work is absolutely completed in every way" and it demanded the balance owing on the contract which it claimed it was under-

stood was to be paid by the owner to the plaintiff. The only evidence, therefore, with respect to the work done on the seventh of January, which was uncontroverted, was that relating to the sidewalk. Moreover it does not appear that Fitzgerald undertook to remove the material to any particular place and, therefore, it did not concern the owner if he stored the rock on the adjoining lands with the consent of the owner thereof or committed a trespass in so doing. (See *Berg v. Parsons*, 156 N. Y. 109.) Furthermore, there is evidence tending to show that both the owner and plaintiff were desirous of having the excavated rock left in the vicinity to be used in the construction of the foundation walls and building. It is perfectly clear on the evidence that the contract for the excavation under which this lien was filed did not embrace any work with respect to the sidewalk.

As already observed, the only evidence with respect to what was embraced within the excavation contract is the testimony of Fitzgerald, who expressly states that there was no agreement between him and the owner with respect to the sidewalk. Aside from claims made by the owner, by letters and verbally, that it was the duty of both Fitzgerald and the plaintiff, under the respective contracts, the one for the excavation and the other for the construction of the foundation, to restore the sidewalk, there is no other evidence on the subject; but it appears by a letter written by the owner to Hess, intended for the plaintiff, on the 5th of June, 1913, that she claimed to have deposited \$250 with the city authorities as security for the restoration of the sidewalk by Fitzgerald; and she testified that she did this to enable Fitzgerald to obtain a permit to haul the excavated material over the sidewalk, and that he, as a condition of obtaining the license, promised and agreed to restore the sidewalk to the condition it then was in; and that in the month of September she considered the sidewalk properly restored and was satisfied with it; but that the city inspector was not, and that, therefore, the city authorities did not return the money so deposited and which she testified was deposited by Fitzgerald, but thereafter admitted that it was probably deposited by her as stated in said letter. There is no *direct* evidence with respect to any injury or damage to or interfer-

App. Div.]

First Department, May, 1917.

ence with the sidewalk by Fitzgerald; but when the owner abandoned completing the building as cold weather was coming on in the fall, she called upon him to restore the flagging and he testified that he reflagged the sidewalk on Merriam avenue and that the plaintiff at his request reflagged it on University avenue, which accords with the testimony first given by Colon with respect to when the sidewalk was repaired. Prior to December 1, 1913, it appears from letters written by the owner to Hess, intended for the plaintiff, and by testimony with respect to verbal claims made by her that she insisted that the sidewalk should be restored either by Fitzgerald or the plaintiff to the satisfaction of the inspector representing the city, before she would make any further payment; but on the last mentioned date she wrote the president of the plaintiff, stating that she expected to settle with Fitzgerald that month and hoped that in the meantime his company and Fitzgerald would settle their differences, and that she would notify him of the time and place of payment; and that the \$250 deposited with the city would be withheld until the plaintiff or Fitzgerald restored the sidewalk to the satisfaction of the city authorities.

The evidence concerning what was done with respect to the sidewalk on the 7th of January, 1914, is altogether too indefinite to require a finding that it was any part of the work which Fitzgerald was obligated to do, either under his contract for excavating the lot or pursuant to the arrangement by which he obtained a permit to use the sidewalk and the owner deposited the money required by the city therefor; but in any event, at most, it *relates* to some work which it was the duty of Fitzgerald, under the conditions of the permit and under his agreement with the owner with respect to furnishing the security for the permit, to perform, and constituted no part of the excavation work.

Although there was an obligation flowing from Fitzgerald to the owner to restore the sidewalk, which obligation arose either out of his interference with the sidewalk or by virtue of his agreement at the time the owner furnished the security for the permit, there is upon no theory any evidence of an agreement on the part of the plaintiff to perform such obligation on the part of Fitzgerald to the owner. It is

fairly to be inferred that in so far as the sidewalk was interfered with such interference occurred before the work was sublet to the plaintiff and it does not appear that the plaintiff agreed to do anything other than to complete the excavation of the earth and rock.

As I view the case, therefore, whatever work was done with respect to the sidewalk on the seventh day of January was exacted by the owner as a performance of Fitzgerald's obligation to her, arising on an implied duty or out of the agreement made at the time she deposited the money for the permit, and it constituted no part of the work of excavation for which a valid mechanic's lien could be filed, either by the contractor or by a subcontractor. The work for which a lien may be filed is the work the contractor is engaged to perform in improving the premises. The authorities upon which the learned counsel for the appellant relies holding that a mechanic's lien may be filed for constructing a sidewalk in connection with the improvement of real estate (*Mosher v. Lewis*, 14 App. Div. 565; *Kenney v. Apgar*, 93 N. Y. 539, 549; *Moran v. Chase*, 52 id. 346) have no application here where the contract was *merely to excavate* and the interference with the walk was for the *convenience* of the contractor and, therefore, the duty to restore the walk, whether implied or expressed, constituted no part of the *improvement* made upon the land for the benefit of the owner for which a lien could be filed either by the contractor or by a subcontractor. (See Lien Law, § 3.)

The judgment should be affirmed, with costs.

SCOTT and SHEARN, JJ., concurred; SMITH and PAGE, JJ., dissented.

PAGE, J. (dissenting):

The plaintiff is a subcontractor who performed work in excavating for a building to be erected upon the defendant's premises in the city of New York.

It was shown that there was a balance due to the plaintiff's contractor at the time of the filing of the lien of \$3,536.30 and the amount of work done by the plaintiff was \$3,939.80, for which payment has not been made. The learned justice at the trial, however, dismissed the complaint, upon the ground that

App. Div.]

First Department, May, 1917.

the notice of lien was not filed within ninety days after the performance of the last items of work under the contract, pursuant to section 10 of the Lien Law (Consol. Laws, chap. 33; Laws of 1909, chap. 38).^{*} It appears that the notice of lien was filed on the 4th day of April, 1914, and the plaintiff claimed that the last item of work performed under the contract was done on the 7th day of January, 1914, or eighty-eight days prior to the filing of the notice of lien. The evidence shows that the contract was substantially completed during the summer of 1913, but that thereafter the defendant's agent repeatedly wrote to the plaintiff demanding that the rubbish be removed and the sidewalk repaired, and made the doing of this work a condition precedent to making the final payment. The testimony of George Colon, president of the plaintiff, and of Joseph Hess, an employee of the plaintiff, that the work of removing the rubbish and repairing the sidewalk was completed on January 7, 1914, is uncontradicted. It is evident from the correspondence between the defendant's agent and the plaintiff that the defendant claimed that this work was within plaintiff's contract, and that plaintiff eventually accepted this construction of the contract and performed the work. The learned justice who decided the case held that the removal of the stones from the adjoining premises was not work done upon the premises and cannot be considered as work done under the contract. He also finds that there was no proof of any work performed on the sidewalk within the period of ninety days before the lien was filed, and states that the sidewalk had been accepted by the owner as satisfactory on November 8, 1913, when she returned the sum deposited with her as indemnity to insure against improper relaying of the sidewalk. In so finding he must have overlooked the testimony shown above, both as to the removal of stones from the cellar around the seventh of January and the fixing of the sidewalk, which is uncontradicted. Though this work was unsubstantial in its nature and undoubtedly from the evidence it appears that the contract had been substantially performed several months before January, 1914, and had been accepted by the defendant, the authorities show

^{*} Since *amd.* by Laws of 1916, chap. 507.—[REP.]

that the statutory limitation as to the time of filing a lien does not date from the time of substantial performance of the contract or from the time of acceptance of the work, but dates from the time when the last minute item of work upon the contract was performed. (*Milliken Bros., Inc., v. City of New York*, 201 N. Y. 65; *Chambers v. Vassar's Sons & Co., Inc.*, 81 Misc. Rep. 562.) As pointed out in these cases a contractor cannot of his own volition perform some minute detail of work or deliver material to the premises after the completion of the contract, for the purpose of renewing his right to file a lien; but where, at the request of the person against whom the lien is claimed, additional work or materials are furnished upon the premises in good faith, the time for the filing of the lien is ninety days from the date of such performance.

In the case at bar the removal of the stones from the cellar and the fixing of the sidewalk are shown to have been done in answer to the defendant's demands, and in my opinion the notice of lien was sufficient if filed within ninety days of January 7, 1914. A sidewalk has been held to be an appurtenance of the premises within the meaning of the Lien Law, and work done upon it is, in contemplation of law, work done upon the premises. (*Kenney v. Apgar*, 93 N. Y. 539.)

The judgment should be reversed and judgment granted for the plaintiff, with costs.

SMITH, J., concurred.

Judgment affirmed, with costs.

MAX A. SINGER, Respondent, v. HENRY DISSTON & SONS, INC.,
Appellant.

First Department, May 18, 1917.

Contract — agreement to furnish plans for exhibition booth — acceptance conditioned upon approval of plans by exhibition authorities — evidence — disapproval of plans and allotment of space on other plans.

Where defendants intended to exhibit at the Panama exhibition if they could procure from the authorities in charge thereof an allotment of space, which could only be had after the approval of a proposed plan of their exhibit, and the plaintiff offered to prepare plans for such exhibit,

App. Div.]

First Department, May, 1917.

which offer was accepted by the defendants in a letter stating that "should we be the successful applicant, and the space referred to be awarded to us, we will gladly contract with you to furnish the material and erect the booth per plans and bid submitted," the agreement to accept the plaintiff's plans was conditioned upon the defendants being awarded the space at the exhibition after an approval of the plans by the exhibition authorities.

Hence, in an action to recover the contract price for the plans it is error for the court to exclude evidence offered to show that the allotment of space to the defendants was refused upon the plaintiff's plans and was allotted upon plans made by other persons.

The defendants' letter was not merely an offer to enter into a contract upon certain conditions, but on the contrary was an acceptance of the plaintiff's offer upon terms, and the mere fact that the parties contemplated reducing the agreement to more formal terms is not important. Nor is such contract void for lack of essential details regarding the materials to be used in the construction of the exhibit where it appears that it was understood between the parties that certain customary materials were to be used.

APPEAL by the defendant, Henry Disston & Sons, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of June, 1916, upon the verdict of a jury for \$1,250.

Ralph Polk Buell, for the appellant.

Herman B. Goodstein, for the respondent.

SHEARN, J.:

The judgment under review was entered upon a verdict in an action to recover damages for breach of a written contract embodied in a proposal made by the plaintiff and an alleged unqualified acceptance thereof by the defendant. The learned trial justice held that the writings constituted a binding contract according to the tenor of plaintiff's claim, and submitted to the jury merely the question of damages.

The defendant was an intending exhibitor at the Panama Exposition in San Francisco, and wished to install a somewhat pretentious exhibit provided it could procure the allotment of a desired corner space. Allotments of space at the exposition were made only after submission of proposed plans and the approval of the exhibit plans by the exposition authorities. Plaintiff was in the business of designing and installing exhi-

bition booths, and maintained offices in the city of New York and branch offices in San Francisco. The defendant firm, which was located in Philadelphia, brought the matter to plaintiff's attention. After conferences with the defendant and a visit to defendant's factory, plaintiff prepared plans for defendant's booth, and submitted the plans to defendant with a letter in which he proposed to build and furnish the booth "on corner space 35'x35' as per plan submitted" at an agreed price, \$4,800, with a percentage provision for extra work. There were no specifications, but the evidence fairly establishes that it was understood between the parties that the materials to be used were wood and staff, such as were ordinarily used at the exposition. The defendant in accepting the offer notified plaintiff that it was going to (and it did) send to the San Francisco Fair authorities in charge (one Green) a set of the plans "and then await his decision in regard to awarding the space. Should we be the successful applicant, and the space referred to be awarded to us, we will gladly contract with you to furnish the material and erect the booth per plans and bid submitted." Green required a plan in perspective and after some delay plaintiff got one up but did not get it into defendant's hands in time to submit the same. The defendant, evidently fearing that it would be barred out if it did not submit a plan in perspective, procured through its San Francisco representative new plans to be made by another party, which plans included a perspective, and these were submitted to a jury together with the plans prepared by plaintiff, exclusive of his perspective. Plaintiff's plans were unsuccessful and the space was allotted for the installation of an exhibit on the other plans. Plaintiff insisted, nevertheless, that his rights were fixed by the correspondence irrespective of the fact that the exhibit could not be installed according to his plans, and on defendant's proceeding to award a contract to the party on whose plans the space was allotted, brought this suit, although defendant had offered to recompense him for the time and expense to which he had been put in preparing the unsuccessful plans.

Upon the trial the court excluded evidence offered to show that the allotment of space to defendant was refused upon

App. Div.]

First Department, May, 1917.

plaintiff's plans and was allotted upon other plans, holding that defendant's acceptance of plaintiff's offer was an unequivocal agreement that if the desired space be allotted to the defendant it would erect a booth upon plaintiff's plans. In this we think the learned trial justice erred. While it was not definitely and clearly specified in defendant's acceptance of plaintiff's offer that it was conditioned upon defendant's being awarded space in which to install a booth upon plaintiff's plans the writings are susceptible of this construction and such a condition is clearly to be implied from the surrounding circumstances.

It is unreasonable to assume that the defendant intended to bind itself to pay the plaintiff \$4,800 irrespective of whether the booth was or could be installed according to plaintiff's plans. The first requisite was to get the allotment of space, and it is undisputed that this depended upon the plans. There can be no question about this. Plaintiff in his letter of May thirteenth wrote defendant: "I am perfectly confident that in applying for your space *with these plans* that there will be no question but what the Chief of the Manufacturers Building will be pleased to allot to you the space that you are after." It is true that plaintiff did not agree to enter into any competition with others in the preparation and submission of plans, but neither did he have any exclusive right to this work. The defendant in its letter of acceptance stated that it would send the plans on to San Francisco "and then await his [Green's] decision in regard to awarding the space." It then said that if it should be successful it would contract with the plaintiff to furnish the material and erect the booth "per plans and bid submitted." This clearly imported that the defendant accepted plaintiff's offer to install a booth according to his plan if an allotment of space was made to the defendant to install a booth according to these plans. The defendant had no control over selecting the plans. This was solely within the province of the exposition authorities. Defendant could only exhibit according to plans other than those of the plaintiff. It is, therefore, unreasonable to hold that it intended to bind itself to pay the plaintiff the agreed price for an installation that was not made and could not be made. The court, therefore, erred in holding as a matter

of law that the defendant was bound to pay irrespective of the allotment on plaintiff's plans, and in rejecting the evidence tending to show that his plans were rejected by the exposition authorities.

Defendant further contends that its letter accepting plaintiff's offer did not make a contract, but that it was merely an offer to enter into a contract upon certain conditions. This contention is not well founded. Defendant's letter was not a mere offer to enter into a contract; it was an acceptance of plaintiff's offer upon terms, and the mere fact that the parties contemplated reducing the matter to more formal terms is not important.

Neither is defendant's position well taken that there was no contract because essential details were lacking in the letters; for example, and chiefly, the specifications of material to be used. This would be a forceful argument were it not for the testimony of defendant's representative, Cooper, who admitted that it was understood between the parties that the ordinary materials of wood and staff were to be employed. This must have been so in view of plaintiff's making a definite price, for otherwise this would have been impossible.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and DAVIS, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

HELEN F. LYNETT, Respondent, v. SEA BEACH RAILWAY COMPANY, Appellant.

Second Department, May 11, 1917.

Railroad — negligence — pleading — denial of plaintiff's allegation that injuries were caused on the defendant's railroad — burden of proof as to incorporation.

Where a defendant railroad company sued for personal injuries makes a general denial to the plaintiff's allegation that it is a domestic corporation "engaged in the operation of an elevated railroad from Manhattan

App. Div.]

Second Department, May, 1917.

to Coney Island, in the city of Brooklyn, New York, for the carriage of passengers," the plaintiff having been injured in the borough of Brooklyn, a judgment in her favor will be reversed where the evidence does not show any relation of the defendant to the railroad line on which the plaintiff was injured, and it does on the contrary indicate that another railroad company was operating the line.

The denial of the defendant did not require the plaintiff to prove that it was a corporation, as the defendant did not affirmatively allege that it was not incorporated, but it did cast upon the plaintiff the burden of showing that the defendant was operating the railroad on which she was injured.

APPEAL by the defendant, Sea Beach Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 1st day of November, 1916, upon the verdict of a jury for \$900.

D. A. Marsh [*George D. Yeomans* with him on the brief], for the appellant.

Joseph R. Clevenger, for the respondent.

THOMAS, J.:

The plaintiff has a judgment for injuries received on New Utrecht avenue as she was entering a Sea Beach line car at Sixty-second street. Presumably the *locus* was in the borough of Brooklyn. The complaint alleges that the defendant is a domestic corporation "engaged in the operation of an elevated railroad from Manhattan to Coney Island, in the city of Brooklyn, New York, for the carriage of passengers." To that there is a general denial. The answer involves a denial (1) that the defendant was a corporation; (2) that it was operating the railway as alleged. As there is no affirmative allegation in the answer that the defendant is not a corporation, the plaintiff was not required to prove it. (Code Civ. Proc, § 1776.) But a corporation may exist even under the name of the Sea Beach Railway Company and yet not be operating the railway whereby the plaintiff was hurt. There was a railway, and there were railway cars. Where did the railway begin? Where did it end? What place did it traverse? What relation

did this corporation bear to it? To operate what line of railway was the defendant organized? What is stated in its articles of association, or any statute? The record is silent as to every such thing, unless it be found in the following. A witness was asked, "Q. What sort of a car was this? A. Sea Beach line." Is evidence that the plaintiff was entering a "Sea Beach line" car proof that a company called the "Sea Beach Railway Company" owned the car and was operating it? Du Casse testified that on the day he was "conductor on the Sea Beach line of the New York Consolidated Railroad Company," and the record shows that he was engaged on the train in question. That indicates that another company was operating both the line and the car, and precludes a possible inference that the defendant was operating it on account of identity or similarity of name. I have examined *Indianapolis & Northwestern Traction Co. v. Henderson* (39 Ind. App. 324); *Mobile Light & Railroad Co. v. MacKay* (158 Ala. 51); *Kerr v. Quincy, etc., R. R. Co.* (113 Mo. App. 1); *Walsh v. Missouri Pac. Ry. Co.* (102 Mo. 582, 585); *Geiser v. St. Louis, I. M. & S. Ry. Co.* (61 Mo. App. 459); *Keltenbaugh v. St. Louis, A. & T. Ry. Co.* (34 id. 147) and *Chicago Union Traction Co. v. Jerka* (227 Ill. 95). In each case facts appeared that showed that the defendant was the operator of the railway, or permitted an inference that it was so, and there was nothing to rebut it. The difficulty here is that the evidence does not show any relation of the defendant to the line, while it does show an operating relation of another company to the line and that such other company's servant was the conductor of the train.

The judgment should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., MILLS, PUTNAM and BLACKMAR, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

App. Div.]

Second Department, May, 1917.

JAMES J. NOLAN, Appellant, v. JOSEPH FACH, Respondent.

Second Department, May 11, 1917.

Negligence — injury by explosion of soda water bottle — evidence raising question for jury.

Action to recover for personal injuries caused by the explosion of a soda water bottle purchased from the defendant. It appeared that the defendant bought empty bottles and charged them in its factory with soda water and that such bottles would not stand more than fifty pounds pressure, and that as a matter of fact there were from ten to twelve explosions a week in the defendant's factory.

On all the evidence, *held*, that it was error for the court to dismiss the complaint at the close of plaintiff's case, as the question of the defendant's negligence should have been submitted to the jury.

APPEAL by the plaintiff, James J. Nolan, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Richmond on the 29th day of May, 1916, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

Richard J. Donovan [*Herbert D. Cohen* with him on the brief], for the appellant.

John G. Clark, for the respondent.

THOMAS, J.:

The defendant bottled and sold soda water to the plaintiff, who kept it in an ice box, but not in direct contact with the ice. On May 25, 1914, the plaintiff carried a bottle from the ice chest into a room with a temperature between eighty and ninety degrees, where at once the bottle exploded and one of his eyes was thereby destroyed. The bottles had been purchased from one McGinn and were empty champagne bottles. Although the defendant was accustomed to refill bottles, it does not appear how long that in question had been so employed. The plaintiff had received it from defendant some three days before the accident. The plaintiff was constrained to call the defendant as a witness, inasmuch as the court would not receive the examination of the defendant before trial. The defendant explained in what manner he filled and charged the

material in the bottle. It appears that he could raise the charge to three hundred pounds, but that the regular charge was fifty pounds. The defendant testified: "But you regulate it to make it anything you want? A. From one pound to 300, that is the gauge. Q. And it can't go beyond — A. (Interrupting). The bottle wouldn't stand that; the bottle wouldn't stand more than fifty pounds pressure. Q. The gauge fixes it? A. The gauge is fixed so it can't go above fifty." The defendant also gave this evidence: "Q. While you were charging these bottles, have you seen these bottles explode? A. I have. Q. How frequently have you seen that? A. A few times a week. Q. Would you say a dozen times a week? A. May be ten or twelve times. Q. And when you speak of these bottles exploding, were they under a pressure of fifty pounds? A. They were. Q. And is that all the pressure they were under? A. Not all. Q. Were these bottles that you speak of as exploding of the character of Plaintiff's Exhibit 1? [The bottle in question.] A. They were." So, then, the evidence is that the bottles would not stand more than fifty pounds pressure, and that there were ten or twelve explosions each week by charging them. From that evidence the jury could infer that the bottles were liable to explode beyond fifty pounds pressure, and that some of them did explode at that pressure. The defendant's manner of testing the bottles was to hold them up to the light in the course of washing them. Although the plaintiff had not suffered the experience of former explosions, the defendant seems to have exposed him to a considerable risk. Professor Wilhoft, who theoretically and practically was shown to be skilled in such matters, received the remnants of the broken bottle and gave some testimony, although he was quite limited in his answers. He stated that the bottle was charged with carbonic acid gas; that where water taken from the faucet, as it was in the present case, is charged with carbonic acid gas at fifty pounds and subjected to an increased temperature, the liquor would expand, reducing the space above it; that the gas would be heated and expanded with an accompanying increased pressure, and that the liquid would hold more carbonic acid at lower temperatures than at higher temperatures. The witness stated that the change of temperature of a second's

App. Div.]

First Department, May, 1917.

duration would affect the contents of the bottle. The record is no more informative than I have stated, and it may be regarded that evidence was not offered that would completely deal with the subject. But I take the record as it is. The defendant seems to have been engaged in rather delicate business, if the fact be as he states concerning the exploding limit of the bottle and the customary explosions that resulted from charging them. The jury could infer that, either through his lack of skill, or rashness, he was subjecting his customers to the use of bottles charged at or near the exploding point, and that common prudence required a safety margin that is not shown by the present evidence to exist.

The judgment dismissing the complaint should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., STAPLETON, RICH and BLACKMAR, JJ., concurred.

Judgment dismissing complaint reversed and new trial granted, costs to abide the event.

In the Matter of the Judicial Settlement of the Account of EDWARD C. SCHAEFER and GEORGE G. SCHAEFER, as Surviving Executors of and Trustees under the Last Will and Testament of FREDERICK SCHAEFER, Deceased.

ALBERT SCHAEFER, Appellant, Respondent; EDWARD C. SCHAEFER and GEORGE G. SCHAEFER, as Trustees, Respondents, Appellants.

First Department, May 4, 1917.

Trust — apportionment of dividends on stock held by trustees between beneficiary and corpus — increase of value in corporate stock through accumulations of profits made by corporation — sale of stock by trustees to corporation itself — partial liquidation of corporate affairs — when life beneficiary entitled to apportionment of increased value of stock sold — trustees — commissions — effect of annual receipt of commissions — waiver.

Ordinary cash dividends belong to the life tenant or beneficiary of an estate.

Extraordinary dividends representing accumulated profits, whether distributed in cash or in the form of stock, are to be apportioned between the

corpus of the trust and the income, in the proportion in which the surplus thus distributed has been earned before or after the creation of the trust fund. This apportionment is made in order to preserve the integrity of the trust fund and at the same time conserve the rights of the life beneficiary.

When a corporation is liquidated, its assets sold, and the proceeds distributed among its stockholders, an apportionment must be made between the capital of the trust fund and the income, and so much of the sum received by the trustee as represents profits accumulated since the creation of the trust must be attributed to income and paid to the life tenant; otherwise, there would result an increase in the corpus of the fund by accumulations of income, which, except for the benefit of infants, is against public policy and expressly condemned by statute.

Where trustees who are also remaindermen hold one-half of the stock of a domestic business corporation and sell the same to the corporation itself at a time when the value thereof has more than doubled since the creation of the trust, owing to the fact that the corporation retained portions of its profits instead of paying them out by way of dividends, thus enhancing the corporate assets and the value of the stock, there has been in effect a partial liquidation of the corporation and the sum received by the trustees should be apportioned between the capital of the trust fund and the beneficiary under the aforesaid rule which obtains when a corporation is liquidated.

The apportionment should be made in so far as the price received by the trustees on the sale of the stock to the corporation represents accumulated unrestricted profits earned since the creation of the trust. But any increase in the value of the stock not caused by the expenditure upon it of a part of the accumulated profits and any increase in the value of the good will are the legitimate and proper accretions of the corpus of the trust fund and in so far as represented by the price received from the sale of the stock should be accredited by the trustees to capital.

Where the trustees deducted commissions on annual settlements of their accounts they are deemed to have waived any commissions to which they might be entitled in excess of the amount retained by them.

SHEARN and DAVIS, JJ., dissented, with opinion.

CROSS-APPEALS by Albert Schaefer and by Edward C. Schaefer and George G. Schaefer, as trustees, from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 2d day of June, 1916, settling the accounts herein upon the report of a referee.

Conrad Saxe Keyes of counsel [*Axel Josephsson*, attorney], for the appellant, respondent.

Ashbel P. Fitch, for the respondents, appellants.

App. Div.]

First Department, May, 1917.

SCOTT, J.:

The interesting and important question presented for our consideration is that raised by the appeal of the objector, Albert Schaefer.

Frederick Schaefer, the testator, died in May, 1897, leaving a last will and testament and a codicil thereto, all of which were duly admitted to probate. By the terms of the will his executors, the present accountants, were directed to divide the estate into a number of shares, one of which was to be held in trust for the benefit of Albert Schaefer during his life, the remainder, in case he died without children, going to the two accountants and two other children of the testator.

One of the principal assets of the estate consisted of 2,499 shares of the capital stock of the F. & M. Schaefer Brewing Company, a corporation organized with a capital stock of \$650,000, represented by 6,500 shares. At the time of the testator's death one-half of the stock of the brewing company was held by him and the members of his family. The testator's stock was held by the accountants as executors until 1902, when it was distributed among the parties in interest, 500 shares being allotted to the trust required to be set up for Albert Schaefer. These shares were held by the accountants as trustees of said trust until September, 1912, when they were sold, together with all the other stock held by the trustees, for the benefit of other beneficiaries under the will or owned individually by the trustees and others, the total number of shares sold being 3,250, or one-half of the capital stock. The purchaser was the brewing company itself, and the agreed price was paid in cash or its equivalent. During the time the accountants held the stock as trustees Albert Schaefer received his proportionate share of all the dividends declared and paid by the brewing company.

The stock was carried by the trustees at a valuation of \$200 per share. It was sold for \$415 per share. These prices may be assumed to represent with accuracy the respective values of the stock at the time the trust fund was established, and at the time the stock was sold. The trustees were respectively president and treasurer of the company and necessarily cognizant of the value of its assets and consequently of its capital stock.

It is conceded that during the years that the trustees held this stock the company did not distribute all of its profits by way of dividends, but prudently retained each year a portion of the net earnings or profits as a surplus. These profits thus retained went to the enhancement of the assets, and it is to the retention and investment of this surplus that at least some of the increased value of the stock is to be attributed. The trustees have credited to the capital of the trust the whole proceeds of the 500 shares of stock which they held for the benefit of Albert Schaefer. He claims that he is entitled to be paid so much of that sum as represents the income and profits earned, but not distributed by way of dividends.

This presents in a somewhat new phase the question, much discussed in recent years, as to the distribution of the profits of corporations between life tenants and remaindermen, but although that question does not appear to have heretofore arisen under precisely the same circumstances as are here present, I am of the opinion that the principles which have been enunciated by our courts of highest authority afford a sure guide to the determination of the present question.

The whole subject was discussed with much thoroughness by Judge CHASE in *Matter of Osborne* (209 N. Y. 450), in an opinion in which he traced the development of the law upon the subject, citing many cases in England and in this State. The consensus of all the decisions upon the general subject is:

First. That ordinary cash dividends belong to the life tenant or beneficiary of the estate.

Second. That extraordinary dividends representing accumulated profits, whether distributed in cash or in the form of stock, are to be apportioned between the corpus of the trust and the income, in the proportion in which the surplus thus distributed has been earned before or after the creation of the trust fund. This apportionment is made in order to preserve the integrity of the trust fund and at the same time conserve the rights of the life beneficiary. (*Matter of Osborne, supra*, 477.)

Third. When a corporation is liquidated, its assets sold, and the proceeds distributed among its stockholders, an apportionment must be made between the capital of the trust fund and the income, and so much of the sum received by the trustee as

App. Div.]

First Department, May, 1917.

represents profits accumulated since the creation of the trust must be attributed to income and paid to the life tenant; otherwise, there would result an increase in the corpus of the fund by accumulations of income, which, except for the benefit of infants, is against public policy and expressly condemned by statute. (*Matter of Rogers*, 22 App. Div. 428, 436.)

These general rules are not questioned by the trustees, but they say that they are inapplicable here because there had been no payment by way of dividend and no liquidation of the company, which still remains a going concern. This does not, in my opinion, answer the life tenant's claim. It is true that there has been no general liquidation of the company, but there has been a liquidation so far as concerns one-half of its capital stock. The company has bought and holds in its treasury one-half of its capital stock, thus reducing by one-half its outstanding share capital. For that stock it has paid, in cash or its equivalent, what we may assume to represent the value of one-half of its assets. What it may do with that stock hereafter is no concern of the trustees or of their *cestui que trust*. The trustees have at least liquidated, that is to say, have turned into money, their interest in the company which was formerly represented by shares of stock. What does this money in their hands represent? Concededly it represents in part accumulated profits earned during the lifetime of the trust, for the stock they sold represented and stood for one-half of the assets of the company, and those assets in part represented accumulated profits. The reason for the rule which requires, in case of a complete liquidation of a corporation, that an apportionment be made between capital and income, seems to me inevitably to require that a like apportionment be made in the present case. Otherwise, as pointed out by CULLEN, J., in *Matter of Rogers* (*supra*), the accumulated profits will go to the unlawful increase of the corpus of the estate and the enrichment of the remaindermen at the expense of the life beneficiary. As is said by Thompson on Corporations (2d ed., § 5414) in a section quoted with approval in *Matter of Osborne* (*supra*, 476): "The object of the inquiry in every case should be to do justice to the life tenant and remainderman and at the same time effectuate the intention of the creator of the trust."

Justice to the remainderman and to the life tenant requires that the trust fund shall be kept intact, but not enhanced by adding to it any part of the income, and that the life tenant shall receive all of the income whenever that comes into the hands of the trustee. Where the trust fund consists of corporate stock the life tenant will ordinarily be limited to receiving only so much of the profits as the corporation sees fit to distribute in dividends, but when the accumulated profits come into the hands of the trustee in any form or manner the life tenant is entitled to receive them. So far then as the price received by the trustees on the sale of the stock to the corporation represented accumulated, undistributed profits earned since the creation of the trust, the life tenant is entitled to an apportionment. We need not now consider whether or not the application of this just and reasonable rule in the present case will result in compelling trustees to make nice discriminations and apportionments whenever they sell a stock for more than it cost them. As suggested in *Matter of Rogers (supra)*, the inconvenience and inherent difficulty in so doing may serve to prevent any such extension of the rule. In the present case, however, there will be no inconvenience and should be no difficulty in making a just apportionment. Of course, any increase in the value of the company's property not caused by the expenditure upon it of a part of the accumulated profits, and any increase in the value of the good will are legitimate and proper accretions of the corpus of the trust fund and, so far as represented by the price received from the sale of the stock, are properly to be accredited to capital.

There should be no difficulty in ascertaining from the books of the brewing company just how much of the net earnings in each year has been retained and accumulated. Just how the company invested or used its accumulated profits is immaterial. In one form or another it is represented in the assets, and when the company liquidated the trustees' stock by paying for it in cash, it retained all of the assets representing in part the accumulated, undistributed profits.

Unless the parties are able to agree as to the proper apportionment to be made in accordance with the views herein expressed, a further reference will probably be necessary. On

App. Div.]

First Department, May, 1917.

the other question, raised by the appeal of the trustees, I entirely concur with Mr. Justice SHEARN.

To the extent indicated, the decree should be modified with costs to the objector, appellant, payable out of the corpus of the trust fund, and the matter remitted to the Surrogate's Court to be dealt with in accordance with this opinion.

CLARKE, P. J., and LAUGHLIN, J., concurred; DAVIS and SHEARN, JJ., dissented.

SHEARN, J. (dissenting) :

An important question is involved in the appeal of the life tenant, Albert Schaefer, which arises as follows: Frederick Schaefer, the testator, died in 1897, leaving a will under which a trust was created for Albert Schaefer. One of the principal assets of the estate was 2,499 shares of the capital stock of the F. & M. Schaefer Brewing Company, a corporation capitalized at \$650,000, represented by 6,500 shares of capital stock. At the time of the testator's death half the stock of the company was owned by testator and members of his family, and the other half by the testator's brother Maximilian and members of the latter's family: The testator's stock was held by the executors until 1902, when it was distributed among the parties in interest. Upon this division 500 shares of the said stock were allotted to the Albert Schaefer Trust Estate. The trustees held the 500 shares as part of the principal of the trust until September 12, 1912, when they were sold to the corporation at \$415 a share plus a ten per cent dividend. The proceeds of the sale, \$207,500, but not including the ten per cent dividend, were credited by the trustees in their account to the principal of the trust. Up to the date of the sale both of the trustees, George G. Schaefer and Edward C. Schaefer, were directors of the company, the former being the treasurer and the latter the president. As such directors they were in the minority, being two out of five. They were also minority stockholders holding both individually and as trustees only 2,588 shares. What really happened on September 12, 1912, was that the Maximilian branch of the family, employing the credit of the corporation for the purpose, bought out

the interest in the corporation of the family of Frederick, for on the same day the trustees also sold to *the corporation* 334 shares of stock held by them for the benefit of Frau von Burtenbach, one of the children, together with 1,000 shares owned by Edward C. Schaefer individually, 750 shares owned by George G. Schaefer individually, and the individual holdings of Frau von Burtenbach and another daughter Amelia G. Chatillon. All of these 3,250 shares were bought at \$415 each and upon the following terms: \$1,000,000 cash (raised by negotiating a mortgage on property of the corporation and borrowing \$250,000 from Rudolph J. Schaefer on the note of the corporation), \$300,000 by bond and second mortgage of the company, and \$48,750 by a note of the corporation to Edward C. Schaefer, who, together with George G. Schaefer and the other individuals who sold their individual stock, took in part payment a second mortgage for \$300,000 covering certain real estate belonging to the corporation. The stock so purchased by the company was held *as treasury stock* (not *retired*, as stated in the prevailing opinion) and the business continued without interruption and without sale or liquidation of any of its assets or of said treasury stock. There was an increase in the surplus of the company during the period between the death of Frederick Schaefer and September 12, 1912, the surplus having been increased from \$590,000 in 1897 to \$1,100,000 in 1912, exclusive of the increase in the value of the real estate of the corporation. In other words, during these fifteen years, \$34,000 a year on the average was retained and put into surplus. Considering the magnitude of the corporation's business, this was a very moderate amount to carry into surplus, and there is no suggestion of bad faith in the adoption of this reasonable business policy, prompted by a regard for the corporation's welfare. The entire surplus with the exception of a reasonable cash balance was invested in chattel mortgage loans to customers of the brewery, license loans to customers, buildings, brewery machinery, etc., requisite for the proper conduct of the business, so that it appears that the surplus was actually employed as capital. The objection to the trustees' account made by the life tenant is based upon the contention that at least a portion of this

App. Div.]

First Department, May, 1917.

increase in surplus represents accumulated earnings since the death of the testator which should have been available for distribution to stockholders as extra dividends and should equitably pass to him instead of being accumulated and added to the principal of the estate, his theory being that the transaction in question was analogous either to a liquidation *pro tanto* of the company's business or to the declaration of a stock dividend.

The question is a novel and an important one and no case similar to it has been cited by counsel or is referred to in the leading cases that have elaborately reviewed the development of the principle of apportionment of earnings between life tenant and remaindermen.

In *Matter of Osborne* (209 N. Y. 450) Judge CHASE reviews the development of the law. It appears that the early rule in England was that all extraordinary or unusual dividends declared during the continuation of a life estate whether payable in cash or in stock belonged to the corpus of the fund and not to the income. The rule has been materially modified and dividends of cash are now held to belong to the life tenant and stock dividends to the remaindermen, subject, perhaps, to an examination of the facts and circumstances in each case in applying the rule as stated. In this State the earliest case considering the question was *Clarkson v. Clarkson* (18 Barb. [1855] 646), and it was held that the *cestui que trust* was entitled to all dividends of every kind declared upon the stock so far as the same did not intrench upon such capital of the trust fund. In *Riggs v. Cragg* (89 N. Y. [1882] 479) the Court of Appeals said that the right to stock dividends as between tenant for life and remainderman has not been considered by the court of last resort in this State and that it would be the duty of the court when occasion arises to seek to settle the question upon principle. In *McLouth v. Hunt* (154 N. Y. 179) the court held that no distinction should be made between a stock dividend and a cash dividend on that ground alone. It did not discuss the question as to whether a dividend partly earned before the death of a testator and partly earned after the death of a testator, whether the same was payable in cash or in stock, should be apportioned between

the beneficiaries for years or life, and those entitled to the residue. In *Lowry v. Farmers' Loan & Trust Co.* (172 N. Y. 137), which held that the stock dividend belonged to the life beneficiary, the decision might well have proceeded from the intention of the testator as expressed in the will. So in the case of *Robertson v. De Brulatour* (188 N. Y. 301). In *Thayer v. Burr* (201 N. Y. 155) where part of the distribution represented simply the increased or enhanced market value of the securities held by the company exclusive of earnings, it was held that the life tenant was not entitled to this increase in the value of the corpus of the trust. The decision was intended to be a recognition of the right to an apportionment of the dividend so as to preserve the corpus of the trust estate. It was not based upon the alleged right in the life estateman to all dividends so long as they did not intrench upon the capital of the corporation. In *Matter of Hartean* (204 N. Y. 292) a dividend from the surplus earnings of the Metropolitan Plate Glass Insurance Company was considered and the question was whether the sum received by the executors and trustees for the additional stock purchased with the surplus dividend of the Metropolitan Plate Glass Insurance Company was to be regarded as capital or income. Judge WILLARD BARTLETT said: "The question whether the surplus dividend is to be deemed capital or income depends upon the time of the acquisition of the surplus which was divided." The findings of the surrogate showed that the amount of the dividend was \$100,000; that shortly after the testator's death the surplus of the insurance company was \$190,000 and at the time of the adoption of the resolution it was \$279,000, an increase of \$89,000 within that period. This increase was held to be regarded as income and the portion which went to the executors was deemed to be income. Judge CHASE says in *Matter of Osborne*, after reviewing these cases: "It is conceded that the capital of a corporation cannot be divided among the life beneficiaries. It is not alone the *capital of the corporation* that should be preserved, but the *capital of the trust fund* whether invested by the trustees in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is

App. Div.]

First Department, May, 1917.

purchased represents a part of the capital of the estate as fully as does the capital of the corporation."

Judge CHASE further says: "We think that in each case the court should look into the facts, circumstances and nature of the transaction and determine the nature of the dividend and the rights of the contending parties according to justice and equity." He then quotes with approval Thompson on Corporations (2d ed., § 5414), in which it is said: "The object of the inquiry in every case should be to do justice to the life tenant and remainderman, and at the same time effectuate the intention of the creator of the trust; and on this theory, in order to effectuate such intention and to do justice between the parties, a court may, under the circumstances of a given case, apportion a dividend between the life tenant and the remainderman."

Judge CHASE then reaches this conclusion: "1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

It is conceded by counsel and it should be held that in the case of an ordinary sale by an executor of shares of stock held in trust for a life beneficiary with remainder over, the life beneficiary is not entitled to cause an investigation into the accounts of the corporation or corporations whose stock is sold and have determined and apportioned and paid to him the proportionate part that might in equity be said to represent surplus profits of the corporation or corporations during the period of the trust. Consequences of enforcing apportionment in all such cases are readily apparent and should be sufficient to make the court hesitate even if it were inclined to adopt such rule. It is sound business policy to carry some substantial part of a corporation's earnings into surplus, not only to enable the payment

of dividends in lean years, but to prevent disaster to the corporation in a year of loss. The corporation itself and all of its stockholders are entitled to have such a policy pursued, and to deny such right would be a substantial injustice to the corporation and to all of its stockholders. Where a stockholder is a trustee the remainderman is necessarily interested in having the corpus of the trust estate protected by the maintenance of a reasonable and safe surplus.

But it is said that this consideration is of no importance when the stock has been sold by the trustee, for then the only question is what is a proper apportionment of the proceeds in the hands of the trustee. While the consideration referred to may not be determinative, it is very suggestive. Concededly, while the stock is held by the trustee, the *cestui* is entitled to a distribution of surplus earnings over dividends actually declared only by showing bad faith on the part of the directors. (*Matter of Rogers*, 161 N. Y. 108, 112, 113.) Having no right, in the absence of bad faith, to obtain, use for his own purposes or dissipate the surplus earnings, over dividends declared, during the period that the trustee holds the stock as an investment, it is not clear how any different or greater right is created by the mere act of the trustee in changing the form of the investment. Neither can it make any difference in principle whether the stock be sold to the issuing corporation or sold on the stock exchange. The fundamental basis of an apportionment of earnings or profits of a corporation, between a life beneficiary and a remainderman, is that in the first instance there has been *a distribution or allotment thereof by the corporation*. Until an allotment is made or a distribution takes place there are no profits accrued to stockholders and there is nothing to apportion. (*Matter of Kernochan*, 104 N. Y. 618, 628, 629; *Hyatt v. Allen*, 56 id. 553.)

But it is said that where, as in this case, a corporation acquires its own stock and puts it into its treasury it is in effect a retirement of the stock paid for out of surplus, and that this is tantamount to a distribution of surplus. One sufficient answer to this argument is that it was shown that the stock was not paid for out of surplus. The testimony establishes that no cash on hand, representing earnings, and no

App. Div.]

First Department, May, 1917.

part of the surplus was employed in paying for the stock. All of the cash paid was raised by borrowing money, partly on the security of a mortgage placed upon the corporation's real estate and partly on the corporation's note. Further, stock held in the treasury is not, even in effect, retired stock. It may be sold at any time, and in this case, if sold at the same price at which it was acquired and used to pay off the mortgage and note, the surplus at the close of the transaction would be just what it was before the stock was acquired. How then can it be fairly said that the use of the proceeds of a corporate mortgage to acquire outstanding stock to be held in the corporation's treasury involves or is tantamount to a *distribution* by the corporation of its surplus earnings? A still further obstacle in the path of any such reasoning exists in the case at bar, for the surplus, exclusive of the increase in real estate values (not involved), consisted mainly of chattel mortgages, license loans to customers, buildings and machinery, all employed as capital. So, unless the corporation was going out of business, the supposed distribution of surplus could only be theoretical.

Again, it is argued that if it be held that there was not distribution analogous to a stock dividend, the transaction should be treated as a liquidation of the corporation, at least *pro tanto*, in which case the rule of apportionment would apply. But it was not a liquidation of the corporation's business in any sense, for the corporation continued right on with its business, as was the intention that it should. The mere fact that a full half of the capital stock of the corporation was sold makes no difference, for if it were all sold and the corporation were to continue business there would be no liquidation, and the vendors, whether life beneficiaries or remaindermen, or absolute owners of the stock, would have no interest in or claim upon the surplus, and in the case of a trust estate there would be no occasion for any apportionment. But it is said that if *all* the stock were sold to the corporation itself and paid for by a distribution of the surplus, this would be tantamount to liquidation, and the same principle ought to apply when, in a closely held family corporation, one-half of the stock is sold to the corpora-

tion and paid for by a distribution of the surplus. In the case of a sale of all the stock to a corporation, the intention being to retire the stock, it would doubtless be held that this was tantamount to a liquidation of the assets of the corporation, for it is inconceivable that a corporation would continue to do business without any stock, except treasury stock, and, consequently, without any stockholders. No such situation exists, however, on a purchase of half the stock for, as we have seen, this corporation was to go right on doing business. Much less would it amount to a liquidation where the stock bought and turned into the treasury, with which we are concerned, was only a small block of 500 shares. Moreover, as we have pointed out, this 500 shares was not paid for out of surplus earnings but by borrowing money, and it was not retired, but was put into the treasury.

Finally, it is argued that, whatever the forms employed and irrespective of whether the proceeds of the sale do represent a distribution of earnings, here is a case where during the life of the trust the stock, composing the corpus, advanced in value from \$200 to \$415 a share and the sale price of \$415 must have been arrived at by taking into account the surplus, and it must to some extent *represent* earnings that were not distributed, and which, if distributed, would go to the life beneficiary. Why such a rule should apply here and not apply (as is conceded by appellant's counsel) in the ordinary case of a sale of stock by a trustee when he changes the form of the investment is not stated. It is suggested that the circumstances are peculiar here in that the trustees are remaindermen. But that makes no difference in the absence of bad faith, and there is no intimation of bad faith. It does not even appear, as would ordinarily be the case, that in fixing a price the surplus was taken into account, for the price was fixed, as is the custom in buying a brewery, according to the testimony, on the basis of the barrelage, or annual output. The price was arrived at by taking the barrelage, 200,000 barrels, at \$5 a barrel, adding thereto the value of the real estate, and deducting the liabilities and then dividing the net amount by the number of shares.

Notwithstanding the uncontradicted testimony that the sale price of the stock was fixed without regard to the surplus, it is

App. Div.]

First Department, May, 1917.

insisted in the prevailing opinion that the proceeds of the sale in the hands of the trustees "represent" in part accumulated profits. Indeed that is the basis of the forceful and persuasive opinion of Mr. Justice SCOTT, which proceeds upon original grounds quite independent of the contentions advanced by the appellant. That conclusion is reached by assuming that the price paid "represented" one-half of the corporation's assets because, it is said, the stock "represented and stood for one-half of the assets." But except after liquidation, stock ownership is not ownership of a proportionate part of the assets of the corporation. "The specific thing which is the subject of the trust is not an interest in the property of the corporation, but in the shares of the corporation." (*Matter of Rogers*, 22 App. Div. 428, 437.) "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made * * *. 'He [the stockholder] has no inchoate or other right till the dividends have been declared.' * * * The undivided profits of a corporation may never be received by the stockholders. They may be squandered or lost, and no benefit may accrue to the stockholders therefrom." (*Hyatt v. Allen*, 56 N. Y. 553, 557.) The chance that this surplus might readily be wiped out at any time in the ordinary course of business is particularly apparent, for it was largely invested in chattel mortgages on saloons and in loans to saloon keepers. Given the enactment of a prohibition law, this surplus would vanish over night. It does not seem to me to be accurate in a legal sense, to say that certificates of stock, or the proceeds of their sale, "represent" a proportionate part of all the assets of a corporation. The certificates merely represent certain rights of the holder; his right to vote, his right to share in dividends declared, and his right, on liquidation, to share in the property, but only after creditors have been satisfied. Furthermore, it does not seem to me that, even from a lay point of view, the price paid for the stock "represents" or is much affected by the corporation's surplus. The surplus is an element, but so is good will, future earning capacity, and the ability and character of those who control and conduct the company. As pointed out by the learned referee, when we get to trying to apportion and segregate the particular element in the agreed price repre-

senting the value attributed, in the minds of the bargaining parties, to the surplus existing at the moment, we are entering into the field of speculation and uncertainty.

So far as concerns the intimated illegality of increasing the corpus of a trust fund by accumulations from the income, the question does not arise in a case where the subject of the trust is the shares of a corporation, as was pointed out on page 437 of the opinion of Mr. Justice CULLEN, in *Matter of Rogers* (22 App. Div. 428).

It remains only to see whether any such injustice to the life beneficiary is established, warranting the court's interference, as in *Lawrence v. Littlefield* (215 N. Y. 561), within the rule in the *Osborne* case. Assuming that the rule in the *Osborne* case be extended to reach every case of injustice to the life beneficiary whereby the remainderman profits, irrespective of the legal forms employed, the circumstances of this case disclose no injustice. The price realized was concededly ample. It was to the interest of the trustees as individuals, apart from their duty as trustees, to get the highest possible price. Previous to the sale, the beneficiary's income was swelled by the corporation's policy of employing its surplus as capital. Subsequent to the sale, if any part of the surplus is represented in the price realized, the beneficiary will continue to benefit by it, for it will remain a part of the principal and continue to earn him additional income just as it did when it was employed as a part of the corporation's capital. Before the sale, the beneficiary had an uncertain income, based upon dividends ranging from two to twelve per centum and averaging seven per centum annually. Now he has a fixed and certain income, based upon an investment of the proceeds of the stock sold at a top price and at a period of the corporation's greatest prosperity. His only grievance is that he cannot now spend a part of the proceeds of the sale, thus not only reducing the corpus of the trust, but reducing his annual income from the trust. There is no injustice to him in the situation, and the apportionment contended for by the appellant, Albert Schaefer, was properly refused.

Another point involved is the appeal by the executors from that part of the decree holding that they should not be per-

App. Div.]

First Department, May, 1917.

mitted to apply presently out of the income payable to Albert Schaefer a sum sufficient to reimburse the principal to the extent of the premiums which were paid by the trustees upon the purchase of the corporate stock of the city of New York, beyond a proportionate amount each year based upon the life of each bond, so as to bring each bond to par at its maturity. It appears that about the year 1902 and during the year 1903 the trustees changed the form of the investment of a portion of the trust fund held by them for the benefit of Albert Schaefer from bonds and mortgages secured by real estate to New York city bonds and stock. Before doing so the trustees procured from Albert Schaefer a direction or letter of authority in which he authorized them to retain from the income now in or hereafter to come into their hands enough to reimburse the principal of the trust estate for the amount paid out over and above the par value of the bonds or stock and to reimburse them for any expenses incurred for the sale of the bonds and mortgages. Albert Schaefer signed this letter on the advice of his attorney but testified that he only did so on being informed by the attorney that the trustees would have the power to do it even without the letter (which was, of course, incorrect). The referee correctly held that this improvident arrangement on behalf of the life tenant should not be upheld, particularly as the remaindermen, who included the trustees, were greatly benefited by this arrangement. While the trustees had the right to amortize the premium, they were bound to take into consideration the time when each bond was payable. Otherwise, if the life tenant died shortly after the deduction of a sum sufficient to amortize the entire premium paid on all the bonds, irrespective of the maturing of the several bonds, the remaindermen would be getting the bonds below their market price at the expense of the life tenant's income. The consent of the life tenant was tantamount to an attempt on his part to assign a part of the income of the trust which had not accrued at the date of the instrument, which is invalid under section 15 of the Personal Property Law (Consol. Laws, chap. 41 [Laws of 1909, chap. 45], as amd. by Laws of 1911, chap. 327), re-enacting in amended form section 3 of the former Personal Property Law (Gen. Laws, chap. 47 [Laws of 1897, chap. 417],

as amd. by Laws of 1903, chap. 87). The proper rule is that in accord with the decision of the Court of Appeals in *Matter of Stevens* (187 N. Y. 471), followed by the referee, and his determination in this respect should be affirmed.

There is one further point to be considered, involved in the appeal of the trustees from the decree of the surrogate with respect to commissions of the trustees. It appears that the trustees rendered annual accounts to the life tenant and were, therefore, entitled to commissions at the annual rests. They did not, however, retain the full commissions to which they were entitled, claiming that during these years it was not entirely clear just what they were entitled to as commissions, the period being when the compensation of trustees on the basis of annual rests was not declared or understood with certainty. However, at the time of the last statement rendered by the trustees prior to the accounting which is the subject of this proceeding, to wit, on July 1, 1914, the full amount of income on hand was paid over to the *cestui que trust*, leaving nothing but principal in the hands of the trustees. During the time intervening between July 1, 1914, and July 31, 1914, the date of this accounting, there is nothing to indicate that the trustees received any income. On July 20, 1914, they sold \$7,000 par value of New York city bonds at a loss of \$1,088.66 and transferred the proceeds, amounting to \$6,848.13, to the income account, thereby obtaining for the purposes of this accounting, and after the deduction of additional commissions claimed by them, the sum of \$5,279.19, set forth in the account as income on hand. Out of this they propose to pay themselves the fees that they claim they were entitled to, but which they did not actually retain during the period of the payments referred to. I think that under all the circumstances the surrogate was correct in holding them to the rule stated in *Cook v. Stockwell* (206 N. Y. 481), that, having retained commissions upon the income paid by them, they will be deemed to have waived any commissions to which they were entitled in excess of the amount retained.

Accordingly, the decree of the surrogate should be affirmed, without costs.

DAVIS, J., concurred.

App. Div.]

First Department, May, 1917.

Decree modified as indicated in opinion, with costs to objector, appellant, payable out of the corpus of the trust fund, and matter remitted to surrogate as directed in opinion. Order to be settled on notice.

FIRST NATIONAL BANK OF ANN ARBOR, MICHIGAN, Respondent,
v. JOHN FARSON and WILLIAM FARSON, Individually and as
Copartners Doing Business under the Name and Style of
FARSON, SON & COMPANY, Appellants.

First Department, May 18, 1917.

Contract—agreement by member of partnership doing a brokerage business to repurchase bonds bought by customer—implied authority—evidence—presumption—burden of proof.

The question as to whether a member of a partnership engaged in banking and dealing with investment securities has implied authority to guarantee to a purchaser of bonds the principal and interest and to bind his firm to repurchase the bonds at the end of a specified time if the purchaser so desires, depends upon the facts in each particular case, there being no general rule.

Where the plaintiff purchased bonds relying upon such guaranty and promise made by a member of a partnership without actual authority, and having proved a written guaranty, relies upon the presumption that the partner executing the same had implied authority owing to the nature of the partnership business, and it appears that the bonds sold belonged to the partnership and matured in eight years, there is a presumption of implied authority, and the burden is upon the defendants, sued for a breach of the guaranty to repurchase, to give evidence as to whether the guaranty was within the ordinary manner of carrying on the firm's business. Hence, where the defendants offered no testimony on this question, it was proper for the court, in a trial without a jury, to render judgment for the plaintiff.

APPEAL by the defendants, John Farson and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of December, 1916, upon the decision of the court after a trial before the court without a jury.

Charles F. Brown [*Samuel S. Myers* with him on the brief], for the appellants.

Arnold L. Davis, for the respondent.

SHEARN, J.:

On February 15, 1906, at Chicago, John Farson, Sr., and the defendant John Farson, Jr., both of Chicago, entered into copartnership articles for the purpose of carrying on "the business of banking and dealing in investment securities in the cities of Chicago and New York." The firm as originally constituted carried on this business until July 1, 1909, under the name of Farson, Son & Company, when a new firm of the same name was organized having an additional partner. This 1909 firm carried on the same business until the death of John Farson, Sr., on January 18, 1910, soon after which the executrix of John Farson, Sr., transferred to the defendant William Farson all of the then late John Farson, Sr.'s interest in the firm. On March 1, 1910, the two defendants, John Farson, Jr., and William Farson, and a certain John A. McElroy, became copartners under the name of Farson, Son & Company, and the firm continued the same business until its dissolution on October 1, 1912, by agreement, on which date the defendants John Farson (Jr.) and William Farson entered into the present partnership of the same name and continuing in the same business.

On January 1, 1907, the Eden Irrigation and Land Company mortgaged its properties to secure an issue of bonds, maturing January 1, 1916, payable at the office of Farson, Son & Company in New York. Under the deed of trust, Farson, Son & Company were appointed and became the fiscal agents of the Eden Irrigation and Land Company. Prior to the transactions in suit the firm acquired and owned certain of these bonds, which, in the ordinary course of the business of the firm in "dealing in investment securities," it undertook through its bond salesman Watling to sell to the plaintiff. John Farson, Sr., instructed Watling that he might offer, on behalf of the partnership, to guarantee the principal and interest of five of the Eden bonds if the plaintiff would purchase the same. Pursuant to this authorization, Watling made such an offer, and on April 10, 1908, wrote to Farson, Son & Company advising the firm of the transaction: "First Nat'l Bank of Ann Arbor \$5000 Edens at 99 and int., you to guarantee to repurchase at end of two years if they desire and also to guarantee int. and

App. Div.]

First Department, May, 1917.

prin." On receipt of this letter, John Farson, Sr., affixed the signature "Farson, Son & Company" to the guaranty sued on, contained in a letter on the stationery of the firm, addressed to the plaintiff, and reading:

"Confirming the arrangement made with you by our Mr. Watling.

"For value received, we hereby guarantee payment of principal and interest promptly at maturity of the following bonds, namely:

"Nos. 268-269-270-271-272.

"Eden (Wyoming) Irrigation & Land Company.

"One Thousand (\$1,000) each, dated January 1st, 1907, maturing January 1st, 1916.

"And second. For value received, we hereby agree to repurchase from you, if you so desire, at the expiration of two years, the said bonds at the price paid by you with the accrued interest."

This letter of guaranty was sent by the firm's cashier, under the direction of John Farson, Sr., to the plaintiff with the bonds, and a request was made in the letter transmitting them for a remittance. Relying upon the guaranty, plaintiff promptly paid for the bonds. At their maturity the bonds were presented for payment at the office of Farson, Son & Company in New York, but they were not paid. Thereupon plaintiff on February 18, 1916, demanded payment of the bonds from the defendants by virtue of the guaranty.

It being conceded that John Farson, Sr., had no actual authority to make the contract of guaranty and repurchase, these facts present the question whether the contract was within his implied authority. "Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner." (Partnership Law [Gen. Laws, chap. 51; Laws of 1897, chap. 420], § 5; now Partnership Law [Consol. Laws, chap. 39; Laws of 1909, chap. 44], § 5. See, also, *Union National Bank v. Underhill*, 102 N. Y. 336, 340.) Thus, while concededly the sale of the bonds was within the scope of the partnership business, it must also appear that the guaranty given to promote the sale was within

the ordinary manner of carrying on such business. No general rule for answering the question can be laid down. It must depend upon the facts developed in each particular case. Plaintiff relied upon the presumption arising from the facts above recited; defendants introduced no evidence concerning the ordinary manner of conducting such a business. The real question in this case, therefore, is whether the law casts upon the plaintiff or upon the defendants the burden of coming forward with evidence as to the guaranty being within the ordinary manner of carrying on this firm's business. Where the act in question is, as a matter of common knowledge, manifestly extraordinary and unusual in carrying on a familiar and ordinary business, it may well be that the burden of coming forward with proof should rest upon the plaintiff. Such, for example, would be the case if this guaranty were of the payment of principal and interest of a series of bonds, issued by a third party, maturing at a very remote period, say fifty years or more. But no such rule should apply in a case like this, where the bonds had only eight years to run, and especially where the firm was promoting a sale of its own property. In this connection the case of *Johnston v. Trask* (116 N. Y. 136) is very suggestive. There the defendants were partners, engaged in a general banking and brokerage business, and the managing partner bought for a client and sold to him certain bonds, agreeing at the time of the sale to repurchase them at any time at the price paid. In an action by the purchaser to recover the price paid the Court of Appeals said: "No evidence is found in the record which would justify the court in holding as a matter of law, that the promise upon which the action was brought was so far beyond the scope of the business of the firm, that the plaintiff had no right to rely upon it. The evidence was sufficient to cast upon the defendants the burden of rebutting the presumption arising from the evidence and the pleadings, and they having failed to do this no error was committed in refusing to nonsuit on the ground that the managing partner had no authority to bind the firm by this contract."

In the *Johnston* case it was not averred in the answer that the promise to take back the bonds was beyond the scope of

App. Div.]

First Department, May, 1917.

the partnership business, whereas in the case at bar the answer tenders that issue, but the burden of coming forward with proof on this issue is not determined by the form of the answer but turns upon the facts in the case. In the case at bar, as in the very similar *Johnston* case, no evidence is found in the record which would justify the court in holding as a matter of law that the promise upon which the action is brought was so far beyond the scope of the business of the firm that the plaintiff had no right to rely upon it. This accords with a familiar and wholesome rule with respect to the burden of proof where the facts support an inference in plaintiff's favor, for it would obviously be extremely difficult, if not impossible, for the plaintiff to establish that this guaranty was within the ordinary manner of the defendants' conduct of their business, whereas proof that it was wholly extraordinary and unusual to make such a guaranty in the ordinary business of dealing in investment securities would be readily available to the defendants and, so far as the transactions of this particular firm are concerned, would be entirely under its control. The defendants having elected to rest without attempting to bring forward any evidence on this head, and the facts being such as readily to raise and support a presumption that the guaranty was within the ordinary manner of promoting a transaction which was clearly within the scope of the firm's business and exclusively for the firm's benefit, the judgment was right and should be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, SCOTT and DAVIS, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of the Application of LEONARD M. WALLSTEIN, Commissioner of Accounts of the City of New York, Respondent, for a Warrant for the Arrest and Commitment to Jail of FRANCIS H. RUHE, Appellant.

First Department, May 18, 1917.

Evidence—investigation of municipal department under section 119 of the charter of the city of New York—abrogation of municipal contract—question as to financial condition of incorporated contractor—refusal of witness to answer—contempt—refusal to obey subpoena duces tecum—practice.

Where in an examination into the administration of the office of the commissioner of the department of water supply, gas and electricity in the city of New York, pursuant to section 119 of the charter, it is a question whether the commissioner was guilty of acts "contrary to the interests of the City of New York" in declaring a municipal contract abandoned and terminated, an officer of the corporation with which the contract was made when called as a witness is not entitled to refuse to answer questions bearing upon the financial condition of his company and its ability to perform the contract upon the theory that the evidence calls for the disclosure of business secrets.

Such testimony is not irrelevant upon the ground that the only question involved is the good faith of the commissioner, for, while the commissioner is personally interested in the outcome of the investigation, the interests of the taxpayers of the city are equally involved.

Neither is such witness excused for failing to obey a subpoena to produce the corporation's books and papers on such investigation.

Although such witness was properly adjudged to be guilty of contempt, and a decision to that effect has been granted by the court, it is irregular to commit the witness for contempt without entering the order, when on subsequently appearing in the investigation he persisted in a refusal to testify. Hence a commitment issued under such circumstances without notice will be vacated and the matter remitted to the Special Term for the entry of the proper order.

APPEAL by Francis H. Ruhe from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on or about the 27th day of February, 1917, denying his motion to vacate the writ of commitment herein.

Irving Gordon, for the appellant.

Terence Farley, for the respondent.

App. Div.]

First Department, May, 1917.

SHEARN, J.:

The commissioner of accounts of the city of New York was duly directed by the mayor to conduct, pursuant to the provisions of section 119 of the Greater New York charter, an examination of the administration of the office of the commissioner of the department of water supply, gas and electricity. (See Laws of 1901, chap. 466, § 119, as amd. by Laws of 1916, chap. 517.) Thereafter and pending the investigation, the Public Lighting Service Corporation filed with the commissioner of accounts written charges against the commissioner of the department of water supply, gas and electricity, complaining of specific acts of misconduct in his office in connection with the awarding of a contract to the complainant for gas street lighting and thereafter, declaring the contract abandoned and terminated. The commissioner of the department of water supply, gas and electricity filed with the commissioner of accounts an answer to the charges, and thereupon the commissioner of accounts proceeded, as directed by the mayor, to conduct the investigation and proceeded in the first instance to examine into the matters involved in the charges filed. For the purpose of ascertaining the facts, Francis H. Ruhe, the appellant, president of the Public Lighting Service Corporation, was sworn as a witness and testified at great length to the facts with reference to the various bids by his company and a competitor, the rejection of his company's bids after unsuccessful efforts on the part of the commissioner of the department of water supply, gas and electricity to obtain detailed information concerning the company's financial standing and ability to perform the contract, the subsequent award of a contract, its termination and the award of a contract to a competitor. Upon cross-examination at the hands of counsel for the commissioner of water supply, gas and electricity, the witness refused to answer questions bearing upon the financial condition of his company and its ability to perform the contract, and refused to produce papers and books of the company bearing upon said matters, in pursuance of a subpoena duly served. The objection was first made that the evidence called for the disclosure of business secrets, the disclosure of which would be prejudicial to the company and of benefit to its competitor, and further that the

In the Matter of the Application of PANTHA BROWN BERRY, Appellant, as to the Removal of IRA M. HUGGAN, as Substituted Trustee under a Certain Deed of Trust, Respondent, Dated and Executed October 18, 1911, by Her for Her Benefit, and for Other Relief.

First Department, May 4, 1917.

Trusts—revocation under section 23 of Personal Property Law—jurisdiction where trust is executed in and parties are residents of foreign State—consent—beneficial interest in trust.

Where a deed of trust of personal property was executed in Massachusetts, and all the parties interested are residents of said State and the property will follow the trustee, an application by the settlor for the revocation of the trust under section 23 of the Personal Property Law of this State should be made to the court in Massachusetts.

A home for aged and indigent persons having an agreement with an inmate and her trustee under which it was to receive from the trustee a certain sum per week, is beneficially interested in the trust so as to make its written consent essential to a revocation under section 23 of the Personal Property Law.

APPEAL by the petitioner, Pantha Brown Berry, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of February, 1917, denying the application of the petitioner to terminate a trust of personal property.

Henry S. Mansfield, for the appellant.

George H. Fletcher, for the respondent.

DAVIS, J.:

On October 18, 1911, Mrs. Berry, an aged lady and an inmate of the Gilbert Home for Aged and Indigent Persons in Gloucester, Mass., executed a deed of trust to William A. Pew, Jr., as trustee, conveying to the trustee certain real and personal estate for certain trust purposes set forth therein.

Among the designated objects of the trust were the payment to the home of whatever it had spent on her account, payment for all services the home had rendered to her previous to the execution of the deed of trust, the reimbursement of the home for any sums it should spend on her account and for such services as it may render her subsequent to the execution of the deed of trust.

App. Div.]

First Department, May, 1917.

On March 10, 1913, Ira M. Huggan, of Boston, Mass., by an order of the Supreme Court of the State of New York was appointed trustee in the place of William A. Pew, Jr. The settlor has brought this proceeding to revoke the trust under section 23 of the Personal Property Law of this State, which provides that a trust of this kind may be revoked upon the written consent of all persons beneficially interested in a trust in personal property. (Consol. Laws, chap. 41 [Laws of 1909, chap. 45], § 23, as added by Laws of 1909, chap. 247.) All of the property in question here is personal property.

This application should have been made to the court in Massachusetts and not to the court in New York. The deed of trust was executed in Massachusetts, all of the parties interested are residents of Massachusetts, and the property will follow the trustee. The question of revoking the trust is peculiarly within the jurisdiction of the court of Massachusetts. But assuming that this court should deem it proper to entertain the application to revoke the trust, it would have to be denied for lack of the written consent to the revocation of the home in Gloucester. That this home still has a beneficial interest in the trust is shown in the terms of an agreement entered into between the petitioner, the home and the trustee, on January 30, 1913. ✓

It appears that the petitioner became an inmate of the home June 10, 1902. At that time she signed a paper agreeing to assign to the home all her present and future property. Subsequently she inherited about \$40,000 worth of property from her brother. Thereupon on January 30, 1913, she made an arrangement with the home under which she agreed that her trustee should pay the home \$3,000 in full settlement of all claims of the home against her for board, etc., down to September 1, 1912, and it was also agreed between the home, the trustee and the petitioner, that thereafter the home should receive from the trustee \$7 a week for her care, except charges for nursing and medical attendance. It is, therefore, quite evident that the home is beneficially interested in this trust, and that its written consent is, therefore, essential to the revocation of the trust under the laws of New York.

The appeal is dismissed, with ten dollars costs and disbursements to be paid out of the trust estate.

CLARKE, P. J., SCOTT, SMITH and PAGE, JJ., concurred.

Appeal dismissed, with ten dollars costs and disbursements.

In the Matter of EDWARD CARPEL, an Attorney, Respondent.

First Department, May 18, 1917.

Attorney at law—admission of non-resident attorney on motion revoked.

Admission to the bar of this State of a Pennsylvania attorney, on motion revoked upon the ground that he had not been admitted to practice in the Supreme Court of Pennsylvania, which is the highest court of law in that State, and for fraudulent statement in his affidavit that he had practiced continuously in the courts of Pennsylvania since his admission, and for failure to state that he had been indicted in said State.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

Einar Chrystie, for the petitioner.

O'Gorman, Battle & Vandiver, for the respondent.

CLARKE, P. J.:

The respondent in February, 1905, was admitted upon motion to practice as an attorney and counselor at law by the Appellate Division, First Department.

The petition alleges that in June, 1896, respondent was admitted to practice in the courts of the city and county of Philadelphia and in the Orphan's Court, and in October, 1899, he was admitted to practice in the Superior Court of the State of Pennsylvania. In April, 1901, he was indicted in the city of Philadelphia upon the charge of stealing a gold watch which he had received from a client to deposit as security for a bail bond, and in May, 1902, he was again indicted upon the charge of stealing \$135 belonging to a client. A short while after this last indictment had been filed against him respondent left Philadelphia and went to Pittsburgh, where he was employed in newspaper work. He remained in Pittsburgh for two years, but did not practice law in Pennsylvania after he had been indicted.

App. Div.]

First Department, May, 1917.

Respondent based his application upon his admission to the bar in Pennsylvania, and submitted an affidavit, verified by him, in which among other things he states:

"3. I have practised continuously in the courts of the City and County of Philadelphia since my admission of June 1st, A. D. 1896, and of my admission of June 1st, 1896, in the Orphan's Court, and of my admission to the Superior Court of Pennsylvania of October 5th, 1899."

This statement was untrue in that the respondent had not practiced continuously in the courts of Pennsylvania from the date of his admission therein, as he had refrained from practicing in that State after his indictment in 1902. The respondent concealed from the court the fact that he had been indicted, and although the indictment charging him with the larceny of \$135 had been dismissed in February, 1904, after restitution had been made to the complaining witness, the other indictment charging him with the larceny of the gold watch was still pending at the time he made his application for admission to the bar of this State.

The petition further alleges that the respondent was never admitted to practice in the Supreme Court of Pennsylvania, which is the highest court of law of that State, and, therefore, he was not eligible for admission to the bar of this State under rule 2 of the rules of the Court of Appeals governing the admission of attorneys and counselors at law without examination.

The answer admits the filing of the said indictments, alleges that one of them had been dismissed before his admission to the bar of this State and that the other had not. It further alleges as to that part of the petition which alleges that the respondent in making his application for admission to the bar stated that he had practiced continuously in the courts of the city and county of Philadelphia since his admission on June 1, 1896, and the claim in said petition that the respondent had not practiced continuously in the courts of Philadelphia, that the fact is that the respondent intended to state that he had practiced continuously for three years before being admitted to the bar. As to the allegation that the respondent was never admitted to practice in the Supreme Court of Pennsylvania,

the fact is that the respondent did practice in the Court of Common Pleas, which is the highest court of original jurisdiction in Pennsylvania, and also in the Orphan's Court and in the Superior Court of Pennsylvania, in the city of Philadelphia. Also the respondent argued at least two appeals in the Supreme Court of the State of Pennsylvania, and he regarded himself as a member admitted to practice in that court.

Rule 2 of the rules of the Court of Appeals governing the admission of attorneys and counselors at law, as amended on June 24, 1903, and in force at the time of respondent's admission to the bar provides as follows: "Any person who has been admitted to practice, and has practiced three years as an attorney and counselor in the highest court of law in another State, * * * may, in the discretion of an Appellate Division of the Supreme Court, be admitted and licensed without an examination. But he must possess the other qualifications required by these rules, and must produce a letter of recommendation from one of the judges of the highest court of law of such other State, or country, or furnish other satisfactory evidence of character and qualifications." *

The power to admit to the bar on motion was in February, 1905, conferred "in the discretion of an Appellate Division." In the exercise of that discretion, the court should be informed truthfully and frankly of matters tending to show the character of the applicant and his standing at the bar of the State from which he comes. The finding of indictments against him, one of which was still outstanding at the time of his motion, were facts which should have been submitted to the court, with such explanations as were available. Silence respecting them was reprehensible as tending to deceive the court.

Further, I am of the opinion that a deceit was practiced upon the court which admitted him by the phrase in his affidavit: "I have practised continuously in the courts of the City and County of Philadelphia, since my admission June 1st, A. D. 1896." He had not practiced, by his own admission, continuously in said courts from said time to the time of his admission in the courts of this State, because he had left Philadelphia in

* See Cumming & Gilbert's Official Court Rules (ed. 1907), pp. 363, 364.—[REP.]

App. Div.]

First Department, May, 1917.

1902 and had gone to the city of Pittsburgh, where he had been engaged in the newspaper business and had refrained from practicing law in Pennsylvania thereafter. If the construction which he now puts upon said affidavit is permissible, that it was intended to state that he had practiced continuously for the period required by the rules of the Court of Appeals, quoted *supra*, namely, three years, there would still remain the fact that he did not bring himself within the condition precedent provided by the rule for admission without examination, namely, that he must have been admitted to practice and has practiced three years as an attorney and counselor in the highest court of law in another State, to wit, Pennsylvania. It is not denied that he was never admitted to practice in the Supreme Court of the State of Pennsylvania, which is the highest court of law in that State. He was, therefore, ineligible and this court was without power to admit him.

In *Matter of Backus* (151 App. Div. 813) the court said: "The applicant was admitted to practice in the several courts of the forty-eighth judicial district of the State of Pennsylvania, but was never admitted to practice in the Supreme Court of that State, as is necessary to entitle him to practice in that court, which is the highest court in the State of Pennsylvania. Although the courts in which the applicant has been admitted are courts of the highest original jurisdiction, that does not entitle him to admission here without examination. The rules of the Court of Appeals and the General Rules of Practice of the Supreme Court provide that in the discretion of the Appellate Division a person may be admitted to practice in the courts of this State without examination, who has been admitted to practice and has practiced for the required length of time as an attorney and counselor in the highest court of law in another State. (Rule 2, Court of Appeals, relating to admission of attorneys and counselors at law; Rule 1, General Rules of Practice of the Supreme Court.)

"Admission under our rules by the Appellate Division admits an applicant to practice in all the courts in this State, including the Court of Appeals, which is the highest court. We think the applicant is not entitled to be admitted to practice in this State without being admitted to practice in the

Supreme Court of Pennsylvania and having practiced there for the required length of time.

"The application should, therefore, be denied.

"Application denied, not in the exercise of discretion, but upon the sole ground that this court has no authority under rule 2 of the Court of Appeals and rule 1 of the General Rules of Practice of the Supreme Court to admit the applicant, it appearing that he has never been admitted to practice in the highest court of law in the State of Pennsylvania."

In *Matter of Moskovitz* (169 App. Div. 527) this court said: "It is, therefore, clearly established that at the time the respondent applied for admission to the bar he was not legally qualified, and that his lack of qualification was covered up and concealed by the false affidavits as to his service as a law clerk, and the suppression of the facts as to other employments during the same period that he claimed to have been serving a regular clerkship in a law office.

"Under these circumstances his admission to practice was unauthorized by law and was invalid. * * * The only question is whether respondent's admission to the bar was valid. Obviously it was invalid because he was not properly qualified to apply for admission. It follows that his admission must be revoked and it is so ordered."

In *Matter of Pritchett* (122 App. Div. 8); *Matter of Osgoodby* (169 id. 626); *Matter of Marx* (115 id. 448); *Matter of Leonard* (127 id. 493; *affd.*, 193 N. Y. 655); *Matter of Quitman* (152 App. Div. 865), and *Matter of Singer* (156 id. 85) the respondent in each case was disbarred for deceit practiced in the proceeding by which he was admitted to the bar by the suppression of facts affecting his character, conduct and standing.

As the facts are admitted by the answer, there is no necessity for a reference. We are of the opinion that, as it is undenied that the respondent was ineligible for admission upon motion to the bar of this State under the rules of the Court of Appeals in force at the time of his admission the order entered thereon was invalid, and his admission must be revoked.

SCOTT, SMITH, PAGE and DAVIS, JJ., concurred.

Admission revoked. Order to be settled on notice.

App. Div.]

First Department, May, 1917.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GERTRUDE CRANE, as Administratrix, etc., of GEORGE W. SAUER, Deceased, Relator, v. WILLIAM C. ORMOND, President, and JACOB J. LESSER and ST. GEORGE B. TUCKER, as and Constituting the Board of Assessors of the City of New York, and THE CITY OF NEW YORK, Respondents.

First Department, May 18, 1917.

Municipal corporations — city of New York — erection of elevated viaduct equivalent to change of street grade — statutory right of abutting owner to damages.

Where an elevated viaduct supported upon columns was erected over a street in the city of New York for use by the general public as a means of travel there was, legally, a change of grade, although the street below was left at its original grade.

In the absence of statute giving a right thereto, no damage can be recovered by an abutting owner because of such change of grade.

But when the city of New York erected said viaduct over One Hundred and Fifty-fifth street, pursuant to the authority of chapter 576 of the Laws of 1887, which viaduct was accepted by the city as completed in 1893, there was a statute in force (Laws of 1882, chap. 410, § 878) which required the board of assessors to estimate the loss and damage which each owner might sustain by reason of such change in grade and to make a just and equitable award of the amount of such damage.

Hence, there being no limitation as to the time within which the board must act, and as section 951 of the New York charter, as amended, provides that all cases where a change of grade has been made prior to said act shall be governed by the laws in force at the time such change of grade was completed and accepted by the city authorities, an abutting owner is entitled to a determination of his claim for damages resulting from the erection of said viaduct, and, on certiorari brought for that purpose, the court will direct the board of assessors to hear and determine the claim upon the merits.

The city having first resisted the claim for damages upon the theory that there was a change of grade on the erection of said structure, cannot afterwards, in order to defeat the claim, take the position that there was no change of grade.

CLARKE, P. J., and SMITH, J., dissented, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 19th day of December, 1916, directed to William C. Ormond and others, commanding them to certify and return to the office of the clerk of the county of New York all and singular

their proceedings had in respect to the relator's claim for damages.

John M. Harrington and Herbert H. Gibbs, for the relator.

Charles J. Nehrbas, for the respondents.

PAGE, J.:

From July 1, 1886, to March 21, 1900, George W. Sauer, the relator's intestate, was the owner in fee of lands at the southwesterly corner of One Hundred and Fifty-fifth street and Eighth avenue in the borough of Manhattan, city of New York. During that period and until February, 1898, when they were destroyed by fire, there stood frame buildings, which were used as a place of public resort, recreation and amusement. Title to the fee to the land included within the lines of Eighth avenue and One Hundred and Fifty-fifth street, adjoining the premises, had been acquired by the city of New York for street purposes, and the street and avenue graded according to their legally established grade, long prior to the year 1886. Bradhurst avenue is the next street to the west of Eighth avenue. To the west of Bradhurst avenue, at its intersection with One Hundred and Fifty-fifth street, and substantially parallel with Bradhurst avenue, there is a bluff, the top of which is about seventy feet above the grade of Bradhurst avenue. From the foot of the bluff easterly to the Harlem river the land is substantially on a level plane. One Hundred and Fifty-fifth street had never been regulated or graded westerly from its intersection with Bradhurst avenue to the face of the bluff. By chapter 576 of the Laws of 1887 the city of New York was authorized to improve and regulate the use of One Hundred and Fifty-fifth street, and for that purpose to construct an elevated iron roadway, viaduct or bridge for the passage of animals, persons, vehicles and traffic from St. Nicholas place to Macomb's Dam bridge. Work was commenced on this viaduct August, 1890, and accepted by the city as complete October, 1893. One Hundred and Fifty-fifth street is one hundred feet in width. The viaduct is built upon two lines of iron columns, which are eighteen inches square, and are placed in the roadway of the street, and are about forty-three feet between the center

App. Div.]

First Department, May, 1917.

of the columns, measuring from east to west, and about forty feet from north to south, and are about ten feet from the curb on either side of the street. The platform of the viaduct is from fifty to fifty-eight feet and six inches above the pavement of the street in front of the premises, and has an extreme width of about sixty-three feet, and is about eighteen feet distant from the building line of the premises. The platform has a roadway for vehicular traffic and on each side a walk for pedestrians; it is paved with asphalt and paving blocks and is a solid structure. On Eighth avenue, in front of the premises, it extends southerly about thirty feet, and has two supporting columns eighteen inches square, placed upon the sidewalk, and about fifteen feet from the building line of the premises, the platform extending to within ten feet of the premises. A stairway to the platform is built from within the lines of One Hundred and Fifty-fifth street in front of the premises to the southwesterly corner of One Hundred and Fifty-fifth street and Eighth avenue. The surfaces of One Hundred and Fifty-fifth street and of Eighth avenue as they existed on June 15, 1887, have not been changed, and the surfaces of said streets remain as before, open to the public, except for the obstruction of the columns and stairway. The viaduct, during the ownership of relator's intestate of the premises, was used solely as a public highway for horses, vehicles and pedestrians and for no other purpose. Recognizing the fact that damage had been suffered by relator's intestate, for which compensation had not been made, the Legislature passed an act (Laws of 1894, chap. 512) empowering the board of estimate and apportionment of the city of New York, in its discretion, to examine into the claim for damages and in its discretion to make an appropriation for the payment thereof. No action was taken by the said board. The relator's intestate began two separate actions against the city. The first a common-law action for damages in which he recovered a judgment, which was reversed. (*Sauer v. Mayor*, 44 App. Div. 305.) The second an equity action in which he was defeated. (*Sauer v. City of New York*, 90 App. Div. 36; 180 N. Y. 27; 206 U. S. 536.)

In the case of *Sauer v. City of New York* (180 N. Y. 27) the court held that the plaintiff could not recover for the impair-

ment of his easement of light, air and access, upon the theory of the elevated railroad cases. It intimated that he might have a remedy under existing statutes. The court said (p. 30): "The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of public travel, especially in cities where the growth of population increases the use of the highways."

The court thus justified the appropriation of the plaintiff's easement on the theory applicable to change of grade. This clearly appears from the opinion of the United States Supreme Court (206 U. S. 536, 544): "The State courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it." And is emphasized by this court, Mr. Justice SCOTT writing: "In *Sauer v. City of New York* (90 App. Div. 36; 180 N. Y. 27; 206 U. S. 536) the plaintiff claimed consequential damages to his property abutting upon One Hundred and Fifty-fifth street, because of the erection in the street of an elevated viaduct supported upon high iron columns, leaving the street at its original grade in front of the plaintiff's property undisturbed, except for the presence of the columns. This was held in every court to constitute a change of grade" (*People ex rel. City of New York v. Hennessy*, 157 App. Div. 786, 787; *affd.*, 210 N. Y. 617), and the Court of Appeals have also so stated: "It was held in that case [*Sauer*] * * * that it was a change in the grade of the streets within the meaning of the

App. Div.]

First Department, May, 1917.

principle just referred to." (*Smith v. Boston & Albany R. R. Co.*, 181 N. Y. 132, 137.) In the *Hennessy* case, *People ex rel. City of New York v. Sandrock Realty Co.* (149 App. Div. 656; *affd.*, 207 N. Y. 771), relied upon by the respondents, is distinguished, and it is pointed out that the statute there under consideration limited the right to recover damages for the change in grade to certain of the property affected, which did not include the respondent's property "on the theory apparently that, in consequence of the widening of the avenue above that street, no injury would be done to the street easements of abutting property" (p. 788). In my opinion that case should be limited as an interpretation of the particular statute then under consideration and not as declaring a general principle.

It is well settled that there can be no damages recovered by an abutting property owner because of a change of grade unless a right thereto is given by statute.

At the time the change of grade was made in this case there existed a statute that required the board of assessors to estimate the loss and damage which each owner will sustain by reason of such change and to make a just and equitable award of the amount of such loss or damage. (Consol. Act [Laws of 1882, chap. 410], § 873.) In this statute there was no limitation as to time within which the board should act. Section 951 of the Greater New York charter (Laws of 1897, chap. 378 [Laws of 1901, chap. 466], as *amd.* by Laws of 1912, chap. 483; Laws of 1915, chap. 537, and Laws of 1916, chap. 516) provides that all cases where a change of grade has been made prior to the taking effect of that act shall as to the liability to make compensation for damages caused by such change "be governed by the laws in force at the time such change of grade was completed and accepted by the city authorities." The method of assessing such damages is prescribed in said section and a limitation within which to file claims was established. Within the time thus limited the relator filed her claim. The board of assessors have dismissed the claim for lack of jurisdiction. The claim comes within the statute and the board of assessors have power to determine the damage.

In order to defeat Sauer's claim for damages on the theory of the elevated railroad cases that his easement of light, air

and access had been impaired, the city took the position that there was a change of grade. Now to defeat a claim for damages for change of grade they argue that there has been no change of grade.

The courts adopted the city's first theory, and it should not be allowed to change its position now.

The writ should be sustained, the determination of the board of assessors annulled, and the relator's claim remitted to the board with a direction to hear and determine the same upon the merits, with fifty dollars costs and disbursements.

SCOTT and DAVIS, JJ., concurred; CLARKE, P. J., and SMITH, J., dissented.

SMITH, J. (dissenting):

The relator's premises are on the southwest corner of One Hundred and Fifty-fifth street and Eighth avenue. Between July 14, 1890, and October 2, 1893, the city of New York constructed over portions of One Hundred and Fifty-fifth street and Eighth avenue a viaduct connecting St. Nicholas place with Macomb's Dam bridge. St. Nicholas place is at the top of a bluff which rises several blocks west of the property in question and Macomb's Dam bridge crosses the Harlem river several blocks east of the property. The viaduct in front of the property is from fifty to fifty-eight feet above the surface of One Hundred and Fifty-fifth street. The surfaces of One Hundred and Fifty-fifth street and of Eighth avenue in front of the premises have not been changed by the construction of the viaduct, and they remain as before, open to the public, except for the obstruction of the columns supporting the viaduct. The viaduct is used as a public street for foot passengers and vehicular traffic.

The fee to the land in the street and avenue was acquired by the city for street purposes, and they had been duly graded and paved prior to June 15, 1887, on which date by virtue of chapter 576 of the Laws of 1887 the city was authorized to construct the viaduct in question. This viaduct was under construction from 1890 to October 2, 1893, when it was accepted as complete by the city. By the construction and maintenance of the viaduct the easements of light, air and access appurte-

App. Div.]

First Department, May, 1917.

nant to said premises have been diminished and the market value of the premises depreciated. On May 8, 1894, by chapter 512 of the Laws of 1894, the board of estimate and apportionment was authorized in its discretion to examine the claim of relator's intestate for damages and to make an appropriation therefor, to be paid by the comptroller. No action was taken under this statute by the board of estimate and apportionment. Thereafter Sauer, the relator's intestate, brought a common-law action to recover against the city damages suffered to the property by reason of the erection of the viaduct. At Trial Term Sauer recovered a judgment for \$30,000. This was reversed by this court for the improper reception of evidence. Sauer, without a retrial of the law action, sought then in equity to enjoin the use of the viaduct as wrongfully erected. At Special Term his complaint was dismissed. This court upon appeal affirmed that judgment, holding that the damages to this land were *damnum absque injuria*. (*Sauer v. City of New York*, 90 App. Div. 36.) In the opinion it was stated: "The surface of the street below as it existed prior to the construction of the viaduct has not been changed, and it remains open and unobstructed for public travel, except by these stairways and pillars." At the close of the opinion Mr. Justice LAUGHLIN, writing for a unanimous court, said: "The plaintiff has no easement for light, air and access, as against the public, which will enable him to enjoin the making of any changes or alterations, in the street authorized by the Legislature to facilitate public travel. *This being the character of the improvement made*, the action cannot be maintained and the complaint was properly dismissed." Upon appeal to the Court of Appeals the judgment was affirmed (180 N. Y. 27). The prevailing opinion in the Court of Appeals, written by Judge HAIGHT, declares the right of the city to alter a street for the purpose of facilitating public travel without compensation to abutting owners. Judges VANN and BARTLETT dissented, holding that the erection of this viaduct was not such a street use as was lawful without the making of compensation. An extract from the dissenting opinion of Judge BARTLETT is significant, however, upon the question here raised. Judge BARTLETT said: "In the case at bar there is no change of

grade; it is stipulated in the case as follows: 'The grade and surfaces of 155th Street and 8th Avenue, in front of the plaintiff's premises, as they existed on June 15th, 1887, have not been changed by the erection of the viaduct, and the said surfaces of said streets remain as before, open to the public, except for the obstruction by the columns of the viaduct as before stated.' It is thus apparent that the change-of-grade cases have no application." Upon certiorari to the Supreme Court of the United States the determination of the Court of Appeals was confirmed (206 U. S. 536). The opinion of the Supreme Court of the United States in part reads: "The State courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement *equivalent to a change of grade*; and that, *as in the case of a change of grade*, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it." This decision in the United States Supreme Court was handed down May 27, 1907.

By section 873 of chapter 410 of the Laws of 1882 there was imposed upon the board of assessors the duty to estimate the loss and damage sustained or to be sustained by each owner of land fronting on any street north of Sixty-second street (the grade of which was established after March 4, 1852) by reason of a change of grade of any such street in whole or in part, and to make a just and equitable award of the amount of such loss or damage to such owner, both in respect of the land and in respect of the improvements thereon. It is under this statute that this relator, twenty-three years after the completion of this viaduct and ten years after the decision in the United States Supreme Court, during which nothing has been done, seeks to recover from the city for a change of grade of the street.

That this does not constitute a change of grade would seem to me to be a matter of first impression. The street in front of the relator's premises has neither been raised nor lowered; it remains to-day as it existed prior to the construction of the viaduct, adapted for use and actually used for a public street.

App. Div.]

First Department, May, 1917.

It is true that in *People ex rel. City of New York v. Hennessy* (157 App. Div. 786) the prevailing opinion states that in the equity case brought by relator's intestate in this court, in the Court of Appeals and in the United States Supreme Court this change was held to be a change of grade. Also, in *Smith v. Boston & Albany R. R. Co.* (181 N. Y. 137) Judge O'BRIEN referred to the *Sauer Case* (180 N. Y. 27) and said: "It was held in that case that where the original street was elevated upon columns fifty feet above the original surface that it was a change in the grade of the streets within the meaning of the principle just referred to." In neither of these cases, however, was the statement necessary to the decision, and an examination of the cases themselves discloses that neither in this court nor in the Court of Appeals nor in the United States Supreme Court was this construction stated to be a change of grade. In the United States Supreme Court it was significantly stated to be "equivalent to a change of grade" for the purposes of the legal question there discussed. In *People ex rel. City of New York v. Hennessy* (*supra*) it was held that under the special statute under which the construction was made damages were specifically allowed for injury to the abutter by reason of the impairment of light, air and access, and the opinion says: "The scheme of the present act is quite different and plainly contemplates an award of damages, as for a change of grade, to the owners of lands abutting upon Third avenue." In *Smith v. Boston & Albany R. R. Co.* the question at issue was the liability of towns for an actual change of grade of the street made necessary by the construction of an underpass under a railroad and the lowering of the surface of the street itself for that purpose.

In *People ex rel. City of New York v. Lyon* (114 App. Div. 583) the question arose upon certiorari to the board of assessors to review their determination refusing to allow the relator damages for a change of grade in the building of the approaches to the Third avenue bridge across the Harlem river. There, as here, the original grade of the street remained unchanged. The approach to the bridge, however, was constructed upon abutments, which abutments together with the stairways deprived the relator of light, air and access.

It was there held that under that statute in awarding damages to private owners for lands condemned for the erection of the Third avenue bridge across the Harlem river in the city of New York the commissioners should award not only the value of the lands actually taken, but the consequential damage to the remainder of the lands not taken, caused by the shutting off of access thereto by the building of bridge approaches; and that when owners whose land is taken have proved before the commissioners the consequential damage to lands not taken, the presumption is that the award made by the commissioners included such consequential damage, and a subsequent additional award by the board of assessors made on the theory that the grade in front of the premises was changed by the building of the bridge approaches is unauthorized. In the prevailing opinion it is said: "The city has built upon its own land a structure designed for travel in the same manner as a street would be traveled it is true, but it has not in any legal sense changed the grade of One Hundred and Thirtieth street. That street remains at its original grade. If the approach be deemed a street its construction was the laying out of a new one, and no change of grade from that originally established has ever been made. Nor can the building of the approach be deemed a widening of One Hundred and Thirtieth street at a different grade. It is a separate and distinct structure from the street itself. If the respondents have not received compensation for the erection of the approach and the destroying of access to their lands it is unfortunate, but we see no ground upon which the present award can be justified." In *People ex rel. City of New York v. Sandrock Realty Co.* (149 App. Div. 651) the question arose upon the certiorari to review the proceedings of the board of assessors of the city of New York in awarding damages caused by a change of grade of Willis avenue in erecting a bridge across the Harlem river pursuant to the Laws of 1894, chapter 147, and Laws of 1897, chapter 664. By chapter 147 of the Laws of 1894 the Legislature authorized the commissioner of public works of the city of New York to construct a bridge with suitable approaches from a point at the intersection of One Hundred and Twenty-fifth street and First avenue northeasterly across the Harlem

App. Div.]

First Department, May, 1917.

river to and along Willis avenue to One Hundred and Thirty-fourth street, and to make such changes in the grade lines of the streets or avenues approaching said bridge as might be necessary. Specific provision was made in the act for the granting of compensation to abutting owners upon Willis avenue from the bridge up to One Hundred and Thirty-second street. The next intersecting street is the Southern boulevard, and the second intersecting street is One Hundred and Thirty-fourth street. The approach to the bridge as finally completed in August, 1901, occupied seventy feet of the center of Willis avenue, which then was one hundred feet in width. For the purpose of widening Willis avenue between One Hundred and Thirty-fourth street and Southern boulevard, the city on May 22, 1897, took title to a strip thirty-five feet in width on each side, thus making on each side of the bridge approach a street fifty feet in width. The relators' lots are upon the east side of Willis avenue between Southern boulevard and One Hundred and Thirty-fourth street. A strip thirty-five feet in width was taken from their lots, for which they were awarded the sum of \$10,000 for the land taken. Confessedly no award had been made to these relators either for a change of grade or for impairment of light, air and access. Thereupon the abutters upon Willis avenue between One Hundred and Thirty-fourth street and the Southern boulevard from whose land a strip thirty-five feet wide had been taken, proceeded before the board of assessors to have estimated their damage for the destruction of light, air and access by reason of this erection in the center of Willis avenue. Mr. Justice MILLER, in writing for the court, said: "It is plain that, when the original act was passed, it was thought possible that a plan might be adopted which would necessitate a change of grade of the streets intersecting Willis avenue; and, with that possibility in mind, the Legislature provided for damages to property owners affected by such change of grade. While the construction of the viaduct or approach in the center of the street may be deemed a regulation thereof, it is plain that it was not the kind of change of grade that the Legislature provided for by section 3. *The street in front of the claimant's premises*

remains at the old grade. In the center of it, as widened, is a structure which interferes with the claimant's easements of light, air and access. The Legislature did not provide for the case, and the court cannot supply that omission by adopting a construction which the statute was plainly not intended to bear."

The construction in front of the relator's premises on Willis avenue was as much a change of grade as is the construction in the case at bar. It was held in that case that the relator had no remedy because its damages were not specifically provided for by the act authorizing the construction. That case was affirmed in the Court of Appeals in 207 New York, 771. So in the case at bar the construction of this viaduct was authorized by chapter 576 of the Laws of 1887 and no provision whatever was made in that act for damages to abutting property owners arising from the deprivation of light, air and access. If this relator has her remedy under the Consolidation Act of 1882 cited, so had the relator in the *Sandrock* case, and the denial of any remedy to the relator in that case in the absence of specific provision therefor in the act authorizing the construction is, to my mind, a controlling authority for the denial to the relator in the case at bar of any remedy in the absence of specific provision in the act authorizing the construction of this viaduct.

Moreover, the enactment of chapter 512 of the Laws of 1894 is a legislative interpretation of the law of 1882 cited. The Legislature would never have given to the board of estimate and apportionment the discretion to compensate the abutter if the abutter might collect his damages under the statute of 1882. Because he was remediless under existing law the act of 1894 was passed for his benefit and to that law alone must he now look for his remedy.

In my judgment the determination should be affirmed, and the writ dismissed, with costs.

CLARKE, P. J., concurred.

Writ sustained, determination of the board of assessors annulled, and claim remitted to said board as directed in opinion, with fifty dollars costs and disbursements. Order to be settled on notice.

App. Div.]

Second Department, May, 1917.

JESSIE LOPER, Respondent, v. LUCY J. ASKIN, Appellant.

Second Department, May 11, 1917.

Husband and wife — alienation of affection — scienter of defendant essential — evidence not establishing cause of action — failure of defendant to testify.

A plaintiff in an action to recover for the alienation of her husband's affection, she having previously separated from him, is under the burden of proving *scienter* on the part of the defendant, that is to say, that she knew of the relation she was breaking up.

Moreover, facts must appear from which it may be inferred that the woman defendant was the pursuer, not merely the pursued, and she does not become liable because she may have accepted the admiration of the plaintiff's husband.

As the wrong involves moral turpitude, no presumption of guilt can be indulged, unless the facts cannot be otherwise reconciled.

Evidence in such action examined, and *held*, that a judgment for the plaintiff should be reversed because of her failure to prove *scienter* on the part of the defendant.

As the plaintiff had not proven a cause of action when she rested no inference against the defendant can be drawn because she was not sworn in her own defense, for she was not obliged to contradict or explain facts which were insufficient to establish her liability.

MILLS and RICH, JJ., dissented.

REARGUMENT of an appeal by the defendant, Lucy J. Askin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 6th day of May, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 3d day of May, 1916, denying defendant's motion for a new trial made upon the minutes.

The action was to recover for the alienation of the affection of plaintiff's husband, and the judgment was for the sum of \$2,341.79. (See 176 App. Div. 934.)

Carl J. Heyser, for the appellant.

Frank W. Shaw, for the respondent.

PUTNAM, J.:

In September, 1914, plaintiff had separated from her husband, Frank Loper, who kept a livery stable and doctored horses in the village of Patchogue, L. I. This action was

begun December 29, 1915, against Mrs. Askin, who had a hotel at Medford, L. I. At the conclusion of plaintiff's case defendant moved for a dismissal, and having excepted to such refusal to dismiss, offered no evidence for the defense. The jury rendered a verdict for \$2,250.

Plaintiff's testimony failed to establish her case. The action for enticing away one from his contract relations (even those of master and apprentice) requires proof that defendant knew of the relations he was breaking up. (*Stuart v. Simpson*, 1 Wend. 376.) Hence this complaint properly charged defendant with "contriving and wilfully intending to injure the plaintiff and to deprive her of the comfort, society, aid, assistance and consortium of the husband." This allegation seems essential. (*Webber v. Benbow*, 211 Mass. 366.) Plaintiff must make out wrongful and willful intent to engage the husband's affection and thereby to seduce him from fidelity to his wife. (*Whitman v. Egbert*, 27 App. Div. 374.) Facts must also appear from which it may be inferred that the woman defendant was the pursuer, not merely the pursued. She does not become liable because she may have accepted the admiration of plaintiff's husband. (*Buchanan v. Foster*, 23 App. Div. 542. See *Churchill v. Lewis*, 17 Abb. N. C. 226.)

As the wrong involves moral turpitude, no presumption of guilt can be indulged, unless the facts cannot be otherwise reconciled. (*Buchanan v. Foster*, *supra*.)

Defendant lived in Medford, some four miles from Patchogue, plaintiff's home. The record is destitute of proof of *scienter*. If the incident of plaintiff's sudden attack on defendant at the Mineola fair in the fall of 1915 might give rise to an inference that the assailing woman was the wife of defendant's escort, which may be doubtful, still there is no evidence of acts of association between defendant and Loper subsequent to that date.

When the plaintiff rested, her cause of action was not made out. Hence no inference could be drawn because defendant was not sworn. Defendant is not called upon to introduce evidence to contradict or explain facts which were insufficient to establish any liability against her. (*Shotwell v. Dixon*, 163 N. Y. 43, 54.)

App. Div.]

Second Department, May, 1917.

The judgment and order should, therefore, be reversed, and a new trial granted, costs to abide the event.

JENKS, P. J., and BLACKMAR, J., concurred; MILLS and RICH, JJ., dissented.

Judgment and order reversed on reargument and new trial granted, costs to abide the event.

In the Matter of the Judicial Settlement of the Account of Proceedings of FLORENCE C. CARPENTER and Others, as Executors, etc., of REESE CARPENTER, Deceased.

CHARLES H. TYLER, as Liquidating Partner of the Firm of TYLER & YOUNG, and BARNEY & LEE, Claimants, Appellants; FLORENCE C. CARPENTER and Others, as Executors, and Others, Respondents.

Second Department, May 11, 1917.

Decedent's estate — reference of claim against estate — practice—when special findings of fact not necessary — evidence not establishing valid claim for legal services rendered — burden of proof.

On the reference of a claim against an estate which has been rejected by the executors, a referee's report, which in effect results in a nonsuit for failure to establish a valid claim, need not make special findings of fact and conclusions of law separately stated. Moreover, under section 2541 of the Code of Civil Procedure the decision of the surrogate or his referee need not contain separate findings of fact.

Evidence on the reference of a claim against the estate for legal services alleged to have been rendered on the retainer by the decedent examined, and held, insufficient to establish a valid claim against the estate.

Where the alleged legal services involved the right of several stockholders to enjoin a proposed reorganization of a corporation and the claimants proceed against the estate without exhausting their remedy against the other surviving stockholders, they must establish that the decedent was the real and sole party in interest in the suit, or that he had undertaken or directed their employment as attorneys.

APPEAL by Charles H. Tyler and others from a decree of the Surrogate's Court of the county of Westchester, entered in the office of said Surrogate's Court on the 4th day of April, 1916, overruling their exceptions to the report of the referee

herein, confirming said report and adjudging that the appellants' claims are not valid obligations against this estate.

The deceased, with seven other alleged stockholders, on March 31, 1910, filed in the United States Circuit Court for the District of Massachusetts, a bill in equity, for injunction, and for appointment of a receiver, to stop a proposed reorganization of the Knollwood Cemetery Corporation located in Massachusetts. Although on June 30, 1910, a temporary injunction was granted, in July, 1912, the court sustained a demurrer for defect of parties, but with leave to amend, of which the complainants, however, did not avail themselves. The proceedings then stopped. Deceased died in Westchester county on January 13, 1914, leaving a will, which was duly probated. On January 13, 1915, just one year after his death, Mr. Tyler, of the law firm of Tyler & Young, of Boston, presented a claim against the estate for \$24,291 for services and disbursements, and on same date a like claim was filed by Messrs. Barney & Lee, of Providence, for \$20,000. The executors having rejected such claims, the surrogate referred the same to a referee, who reported as to each claim that the same "has not been sufficiently shown or proven to be a valid claim against the estate of said decedent." These claimants duly excepted to such conclusion, also that the form of the report was insufficient, because the facts found and conclusions of law were not separately stated. The learned surrogate overruled the exceptions, and rendered a final decree, from which the respective claimants have appealed to this court.

Harold C. McCollom [*Charles E. Hotchkiss* with him on the brief], for the appellants.

Michel Kirtland, for Charles Rush and Florence C. Carpenter, as executors, and Frederick B. Van Kleeck, Jr., special guardian, etc., respondents.

I. J. Beaudrias, for Orlando T. Carpenter, as executor, respondent.

Frederick B. Van Kleeck, Jr., special guardian for the infant respondent Reese Carpenter.

App. Div.]

Second Department, May, 1917.

PUTNAM, J.:

The referee's report was in proper form. It was in effect a nonsuit which would not call for special findings of fact. Furthermore, under section 2541 of the Code of Civil Procedure, the decision of the surrogate or his referee need not contain separate findings of fact.

Claimants' testimony to prove a retainer from deceased starts at Boston, where Mr. Tyler, of the law firm of Tyler & Young, was visited by Mr. Francis E. Baker, an attorney, who purported to represent the complainants in an intended injunction suit against the Knollwood Cemetery Corporation. Mr. Tyler testified that Mr. Baker called, bringing an introduction from a Boston client, and that Baker said "he was there in the interests of Carpenter and others. * * * And that he wished me to represent them as complainants in an action they knew could be brought which would stay the present reorganization of Knollwood Cemetery." Mr. Baker thereafter verified the complaint as one of complainants' solicitors, and not as agent of the deceased. Messrs. Barney & Lee, the Providence attorneys, who represented Mr. Cammeron, a stockholder, and other interests in the Knollwood Cemetery, admit that they were brought into the litigation by Messrs. Tyler & Young, to whom Messrs. Barney & Lee rendered their bill, and who paid their disbursements. Indeed, in a subsequent interview, Mr. Lee informed the deceased that he had been employed by Tyler & Young, and was proceeding under their direction. Although Messrs. Tyler & Young made efforts to collect their disbursements, as by their direction a bill for about \$3,500 disbursements was sent to the complainant Gardner Wetherbee, it did not appear that they had ever rendered any bill to the deceased during his lifetime, although he survived the termination of this injunction suit about eighteen months. In October, 1912, when there was talk of a new suit, Mr. Carpenter, the deceased, said he had seen Mr. Tyler, and had told him of the arrangement made with Mr. Baker, and that he, Carpenter, did not owe Tyler & Young anything for services rendered.

In these proceedings against Mr. Carpenter's estate, a retainer from him must be proved. As the claimants are proceeding against his estate, without exhausting their remedy

against the surviving complainants, they are bound to establish in substance that deceased was the real and sole party in interest in the Massachusetts suit, or that he had undertaken or directed their employment as attorneys. Yet, in November, 1913, Messrs. Tyler & Young began attachment proceedings in Baltimore against Mr. Baker and the other complainants in the Knollwood Cemetery suit to recover their legal disbursements therein up to November, 1912, stated to be \$3,890.08. By intervening in another proceeding in the Circuit Court, Baltimore county, entitled "Francis E. Baker vs. Druid Ridge Cemetery," Messrs. Tyler & Young effected a compromise, securing substantially \$3,600 from the plaintiffs in that proceeding, among whom was Mr. Carpenter, the deceased.

These circumstances, especially the demand and later the attachment, being confined to a recovery of disbursements only, point to employment of Messrs. Tyler & Young on the basis of some contingency. After Mr. Tyler testified that he had no written agreement with Mr. Baker, he was asked: "Q. Was there any agreement relative to a contingent fee in this case? A. I don't think so. Q. Based upon recovery? A. I don't think so. Q. Will you say that there was not? A. I don't recollect any."

Mr. Baker was the source of claimants' authority and the sole person by whom they were retained. In view of claimants' omission to call him, the learned referee might well infer that there was no such absolute employment from the deceased, as claimants would assert; that deceased did not bind himself to pay for all legal services rendered by the lawyers for all the eight complainants in that suit.

No error appearing, I advise that the decree of the Surrogate's Court of Westchester county be affirmed, with one bill of costs.

JENKS, P. J., MILLS, RICH and BLACKMAR, JJ., concurred.

Decree of the Surrogate's Court of Westchester county affirmed, with one bill of costs.

BERTHA MEISSNER, as Administratrix, etc., of HUGO MEISSNER, Deceased, Respondent, v. ATLANTIC HYGIENIC ICE COMPANY, Appellant.

Second Department, May 11, 1917.

Master and servant — negligence — death of machinist in ice-making plant — evidence not justifying recovery.

Action brought under the Employers' Liability Act to recover for the death of a person employed as machinist and repairman in an ice-making plant. The decedent who had undertaken to make repairs to certain machinery was found on the following day dead and frozen at the bottom of an elevator shaft. There was evidence that some of his bones were broken and that there were internal injuries. Evidence examined, and held, insufficient to support a verdict for the plaintiff and that a new trial should be granted.

MILLS and RICH, JJ., dissented.

REARGUMENT of an appeal by the defendant, Atlantic Hygienic Ice Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 4th day of March, 1916, upon the verdict of a jury for \$5,500, and also from an order entered in said clerk's office on the 14th day of February, 1916, denying defendant's motion for a new trial made upon the minutes. (See 176 App. Div. 934.)

The action was brought under the Employers' Liability Act (Labor Law [Consol. Laws, chap. 31; Laws of 1909, chap. 36], art. 14, as amd. by Laws of 1910, chap. 352) to recover damages for the death of Hugo Meissner, plaintiff's husband, who had been employed at the defendant's ice-making plant, at the corner of Atlantic and Rochester avenues, in the borough of Brooklyn.

Plaintiff's testimony was that her husband, the decedent, was aged twenty-eight years and was quite a tall man.

About eight A. M. of July 17, 1913, the body of plaintiff's husband was found frozen at the bottom of the elevator shaft in the defendant's ice storeroom. Ice in cakes is passed into this storage room through an opening from the anteroom. It is tiered up at different heights, to which the cakes are raised by a lift or "gig" operated by compressed air. The cakes of ice are placed on this "gig" and then raised to the height

where they can be slid out upon the upper tiers. There is a shifter rope operated by hand, by which the "gig" is raised or lowered like a dumb waiter.

Decedent was a machinist and repair man at the defendant's plant, and had been employed there for eight months. The previous afternoon, deceased had been informed that this shifter, or operating rope, had parted. Although he was told that he could defer making repairs till the following morning, deceased started on this errand, saying it would take but fifteen minutes. This was the last seen of him alive. This storage room is kept at a temperature of about twenty-six degrees. At this time it held seven or eight tiers of ice, rising to a height of over twenty feet.

The gig is made to take edgewise a cake of ice measuring eleven by twenty-two by forty inches. Its shaft has three sides closed, the front being boarded up to hold back the rising ice tiers. No one else, apparently, entered the storeroom that night. That elevator was not run in the night time. In the morning, the elevator was found in position about twenty feet high, abreast of the top of the ice. Deceased's body was at the bottom of the pit or shaft, in a reclining position, one leg being across a permanent beam or bunker placed there to stop the gig from descending below the floor level. Deceased's face was turned toward the opening leading out to the anteroom. His body and legs were frozen stiff. There is doubt whether this rigidity extended to his neck. Considerable difficulty occurred in getting out the body through the wall opening, which was only a foot wide and two feet high. By use of crowbars breaking some of the side boarding, making space to have the body in the line for the opening, it was turned on the side and passed out into the anteroom. It had also forcible handling to place it in the box for the morgue. One of the witnesses noticed a red streak or wrinkle on the abdomen; and Mrs. Meissner described a dark mark leading from the neck to the jaw. The surgeon, however, at the autopsy, testified that he noticed no mark of external violence on the head or on the body. He found the sixth, seventh and eighth ribs broken; the spine below the dorsal region fractured. The liver had also been ruptured, with a hemorrhage, partly clotted, into the abdominal cavity.

App. Div.]

Second Department, May, 1917.

In view of the possibility of injuries to the body during its removal, the surgeon was asked as to the possibility of the fractures having been of a *post mortem* origin. He admitted that the fractures could have been so caused, but was unable to state if the ruptured liver and hemorrhage arose after death.

After discovery of this casualty, the chief engineer went up on the roof of the anteroom building, where the shifter rope led, and placed a clamp on the broken ends. He then examined other parts of the hoisting machinery, which he found in good order; at about eleven o'clock the elevator was again running without other repair than reconnecting this shifter rope.

An expert who had formerly worked at this plant, and had knowledge of other ice lifts, gave an opinion that, if the air compressors should be stopped (which occurred every afternoon between the day and the night shifts), the air supply in the cylinder might leak out through worn packing to an extent to let the gig descend, although he had never seen such a thing occur. One of defendant's former employees said he knew of this "gig" coming down apparently of itself, but the possibility of some one handling the shifter rope at that time, either above or under the point of the witness' observation, was not negatived. Against this, defendant's president and chief engineer testified that they had never known of the gig coming down of itself during the four years it had been in operation. An engineer in the firm who built this apparatus testified as to its construction. Air reduced to a pressure of 600 pounds is admitted by valves into a single cylinder, which operates the hoisting cables. There is also a reservoir of compressed air about three feet in diameter and six feet high, which holds from 125 to 150 gallons. Assuming a possible leakage in the packing, it must necessarily lower the gig very gradually. As the gearing is four to one, the gig's actual weight of 160 pounds would represent only forty pounds load upon the piston, which could not overcome the weight and inertia of the piston, piston rod, and the friction of the stuffing box. To start the gig down would, therefore, take a long time, and still longer for it to make the twenty feet descent. This testimony was not the subject of cross-examination. At the close of the proofs,

defendant's counsel repeated his motion to dismiss, on the ground that no negligence by defendant had been established, and that deceased had been shown guilty of contributory negligence, which the court denied.

The jury, however, were instructed that there was no proof of any defect at all in the machinery, including the compressor and its appliances, and no proof of escape of air, or that such a condition existed, or of any actual air leakage at any time. The learned court also charged that there was no omission or failure of duty to inspect. The jury's verdict was for \$5,500 damages. Defendant's counsel moved to set it aside, which the court denied.

James J. Mahoney [*George J. Stacy* with him on the brief], for the appellant.

James I. Cuff, for the respondent.

PUTNAM, J.:

The theory that through pneumatic leaks this gig fell and fatally injured the decedent is opposed to the uncontradicted fact that the next morning, when the body was first discovered, the gig was in its place alongside the upper tier of ice, in good order. This shaft being to raise a cake of ice edgewise, left little room for a man at the bottom to move from an upright position. The gig carried the ice on iron strips. Had such an object delivered the fatal blow, this tall man, in such a narrow shaft, would hardly have room to bend over and take the blow below the dorsal vertebrae. On the other hand, if deceased had slipped from the ice above, and fallen, feet first, down this shaft, the upright beam or bunker at the foot might have made such a contact and internal injury as the surgeon found. The duty to repair this shifter rope required Meissner to go to the break in the line above, and did not call him to the foot of this shaft. The suggestion of the gig falling, through air leakage above, was a hypothesis, which failed to explain and reconcile such facts as the normal position in which the gig was found, with no indications of air escape, and all operating parts in shape to resume running with no other repair than reconnecting this shifter line. There being no proof of defects, and no

App. Div.]

Second Department, May, 1917.

omission by defendant to inspect, if this gig in some mysterious way did cause this injury, still that would not establish actionable negligence. In the absence of defects or of traces of air leakage, or other indication of some neglect, the verdict should not stand.

I advise that the judgment and order be reversed, and a new trial granted, costs to abide the event.

JENKS, P. J., and BLACKMAR, J., concurred; MILLS and RICH, JJ., dissented.

Judgment and order reversed on reargument, and new trial granted, costs to abide the event.

JAMES F. MINER, Respondent, v. CHRISTOPHER REMBT, Sued
as CHRISTIAN REMBT, Appellant.

Second Department, May 11, 1917.

Negligence — municipal corporations — duty of motorcycle policeman to use care when pursuing escaping automobile — injury to such officer by colliding with truck — evidence.

A police officer on a motorcycle engaged in pursuit of an automobile, the operator of which has violated the speed regulations, must use ordinary care, although the speed ordinances do not apply to him when in the performance of his duty.

Evidence in an action by such an officer for personal injuries sustained by colliding with defendant's truck at a crowded street junction while in pursuit of a speeding car and proceeding at night at the rate of thirty-five miles an hour, examined and held, that a verdict in favor of the plaintiff was against the weight of the evidence, and that the complaint should be dismissed.

APPEAL by the defendant, Christopher Rembt, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 20th day of October, 1916, upon the verdict of a jury for \$7,500, and also from an order entered in said clerk's office on the 28th day of March, 1917, denying defendant's motion for a new trial made on the ground of newly-discovered evidence.

On December 28, 1914, the date of this casualty, plaintiff was a motorcycle police officer, engaged in enforcing speed regulations in the borough of Queens. It was about ten-

thirty p. m. The streets were well lighted. No question is made as to the lights on the cycle, or on the truck. As plaintiff cycled eastward on Myrtle avenue and had passed about four blocks easterly of the corner of Cooper avenue, he met a black touring car (which escaped identification) going westward at a rate of forty miles an hour. Plaintiff turned and started in pursuit, working his cycle up to top speed. Cooper avenue, running in a southwestern direction, intersects Myrtle avenue at an angle of about thirty-five degrees. Myrtle avenue has a double line of trolley car tracks. Cooper avenue has no car tracks, being paved with asphalt for a width of eighteen feet, with Belgian blocks along the sides. When plaintiff was near Edison place (which intersects Myrtle avenue a block eastward of the place of collision), he claims that as he looked to his right across to Cooper avenue he saw defendant's truck bound westward. Plaintiff then noticed that his own increasing speed according to his speedometer was thirty-five miles an hour. Plaintiff sounded his cycle horn, but kept gaining in speed, absorbed in looking in front after the vanishing touring car. On the north side of Myrtle avenue was a board fence eleven and one-half feet high, which shut in a view of approaching objects from a vehicle on Cooper avenue coming to the Myrtle avenue intersection. Just to the west of this board fence, with an opening of five or six feet, was a one-story office building, so that by the fence and this building the open space eastward of the curb at the Cooper avenue corner was less than twenty-five feet.

The motor provision truck which defendant drove down Cooper avenue had a speed from ten to twenty miles an hour. Defendant had seen nothing of plaintiff as he approached the corner. Observing an east-bound trolley car on the farther Myrtle avenue track, defendant slackened his speed as he came to the gutter. The motorman beckoned him to pass ahead, and defendant's truck kept on over the car tracks. As it reached the east-bound track, defendant heard a yell and then saw the motorcycle less than fifty feet off, and swerving to the left. Defendant threw out the clutch and put on the brake, but the vehicles were in contact so that plaintiff was thrown between the car tracks, sustaining injuries which were serious and permanent.

Plaintiff testified that "as I got to the corner, or near the corner, I blew the horn for him twice, for him to slacken. I got down to the corner. I was still going along at that speed when this car [the defendant's truck] shot out." Later he estimated that he was three-quarters of a block from the corner when he sounded his horn. On cross-examination he admitted a speed of from thirty-five to forty miles an hour, "around 35," at the time of the accident. It was conceded that Cooper avenue is one of the main arteries of traffic between the boroughs of Brooklyn and Queens; that Myrtle avenue was much frequented, and that this intersection is a busy corner. The verdict was \$7,500.

Edgar F. Hazleton, for the appellant.

Gustav Lange, Jr. [*Harding Johnson* with him on the brief], for the respondent.

PUTNAM, J.:

The plaintiff's proposition comes to this: That in pursuit of a speeding car, this motorcycle can run at night at a speed of thirty-five miles an hour, and strike a converging truck at an acute angle from behind, and recover damages for such resulting injury. The warning rests wholly on the cyclist's horn, given sideways to a truck on a converging street, where a board fence eleven feet six inches high shuts off the plaintiff until the cycle is 100 feet off the truck's path.

No private motorcyclist could make such a claim. But motorcyclist officers assert an immunity under city ordinances. The ordinance makes a speed to exceed fifteen miles an hour *prima facie* prohibited speed. But by section 4 it is declared that this ordinance shall not apply to members of the police department when in performance of their duty. (Speed Ord. Apr. 15, 1913, §§ 1, 4, as amd. See Cosby's Code Ord. [Anno. 1914] pp. 455-457, 475, 476.)

A police officer engaged in pursuit of a fugitive car still has to use ordinary care. Can he dash along a thoroughfare at such a junction as this, and flash up behind a truck at a conceded speed of over fifty feet a second? Reckoning back from the impact only ten seconds would put plaintiff off as far as Tesla place, a block beyond Edison place. A horn

sounded in the block between Edison place and the corner would be less than four seconds before the blow. While plaintiff was hurt while in the discharge of official duty, that duty did not authorize him to ignore the rights of overtaken vehicles at such a crowded street junction. The motorcycle had no brake; its dangerous approach was masked by the fence along the north side of Myrtle avenue. The present judgment reverses the true legal liabilities, since plaintiff was reckless, ignoring defendant's rights at such intersection. Defendant was not at fault. He had no reason to suppose he would meet such disregard of his rights. The cycle horn, given at the time stated, imported no such warning. When defendant saw the plaintiff, they were already *in extremis*.

I advise to reverse as against the weight of evidence, and to direct final judgment dismissing the complaint, with costs in the court below and on this appeal.

JENKS, P. J., STAPLETON, MILLS and BLACKMAR, JJ., concurred.

Judgment reversed and final judgment unanimously directed dismissing the complaint, with costs in the court below and on this appeal.

MOLLIE KASSEL, as Administratrix, etc., of VICTOR KASSEL, Deceased, Respondent, v. EMPIRE TINWARE COMPANY, and SAMUEL BREAKSTONE and PAUL GLASSER, Individually and as Directors of the EMPIRE TINWARE COMPANY, Appellants.

Second Department, May 11, 1917.

Corporations — pleading — sufficiency of complaint in action to compel directors to declare dividends fraudulently withheld from plaintiff in violation of express contract — authority of directors to determine amount of dividends — fraud — fiduciary relation of directors to stockholders — constructive fraud by directors — control of power and discretion of directors by agreement between themselves — Supreme Court — jurisdiction.

A complaint which alleges that the plaintiff's intestate and the two individual defendants had executed a written contract reciting that they owned all the capital stock of the defendant company in equal shares; that it was then worth a certain amount; that upon the death of any party to the agreement within five years his stock should become the absolute property

App. Div.]

Second Department, May, 1917.

of the other parties, the certificate to be retained by the personal representative of the deceased as security; that the survivor should pay therefor the amount stated in specified installments, and that pending payment "all dividends that may be declared by the corporation and earned by virtue of the ownership of the certificate of stock," etc., should be divided between the personal representative of the deceased and the survivors, in the proportion "that their respective interests in the certificate in question bear to each other," and which further alleges that after the death of plaintiff's intestate defendants paid to plaintiff the first installment; that although since the time of the death of the plaintiff's intestate the net earnings of the corporation have been very large, the defendants have refused to declare dividends in accordance with a scheme to withhold the earnings of the company until plaintiff's stock shall be paid for and so defraud the plaintiff, states a cause of action.

The authority of directors to determine what dividends shall be declared does not confer on them the power to commit a fraud.

Directors hold a fiduciary relation to the stockholders.

It is constructive fraud for directors to use their power for their own benefit.

The exercise of the power and discretion of directors owning all the capital stock of a corporation may be controlled by valid agreement between themselves, where the interests of creditors are not affected.

The Supreme Court has jurisdiction to compel the defendants, as directors, to declare dividends in order to prevent them from abusing their power to the injury of the plaintiff.

Such an action may be maintained on the analogy of a suit for specific performance of the express contract between them.

SEPARATE APPEALS by the defendants, Empire Tinware Company and Samuel Breakstone and another, from two orders of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 16th day of March, 1917, denying their separate motions for judgment on the pleadings, consisting of an amended complaint and the answers thereto.

Louis Rosenberg [*Maxim Birnkrant*, with him on the brief], for the appellants.

Benjamin Reass [*Louis L. Quasha* with him on the brief], for the respondent.

BLACKMAR, J.:

The question before the court is whether the complaint states facts sufficient to constitute a cause of action. The complaint alleged that the plaintiff's intestate and the indi-

vidual defendants owned all the capital stock of the defendant corporation; that the amount issued was \$24,000 in par value, of which each owned \$8,000; that on February 17, 1912, the three parties made a formal written contract which, after reciting that they owned in equal shares all the capital stock of the company; that the amount in par value owned by each was \$8,000 but that it was then worth \$12,000, and that each was desirous of securing the stock of the other in case of his death, provided that upon the death within five years of any party to the agreement his capital stock of the par value of \$8,000 should become the absolute property of the other parties, the certificate, however, to be retained by the personal representative of the deceased as collateral security for the payments therein covenanted and agreed to be made by the other parties; that the survivors should pay therefor the sum of \$12,000 in the following installments: \$1,000 thereof within three months, with six per cent interest from the date of death of deceased, and thereafter \$500 semi-annually with six per cent interest until the whole \$12,000 should be paid. The contract then provided that pending the payment for the stock "all dividends that may be declared by the corporation and earned by virtue of the ownership of the certificate of stock," etc., should be divided between the personal representative of the deceased and the survivors in the proportion "that their respective interests in the certificate in question bear to each other, the interest so to be determined by crediting the survivors with the amount paid thereon and the personal representative of the decedent with the amount still due and owing." The complaint further alleged that plaintiff's intestate died on July 22, 1916; that defendants paid to plaintiff the sum of \$1,180 as a first payment on October 20, 1916; that at the time of the death of plaintiff's intestate "and for the period of time thereafter down to and including the present" the earnings of the corporation over and above all debts and liabilities equalled or exceeded the sum of \$100,000, and that the defendants have refused to declare dividends in accordance with a scheme to withhold the earnings of the company until plaintiff's stock shall be paid for, and so defraud the plaintiff out of her share of the earnings of the company.

App. Div.]

Second Department, May, 1917.

We think that the complaint states a cause of action. It was the evident intent of the parties that the plaintiff, as representative of the deceased stockholder, should share in the profits of the business during the twelve years which should elapse before the stock should be fully paid for. The contract expressly provides, not only for a division of the dividends declared, but of those "earned by virtue of the ownership of the certificate of stock." Although it is not accurate to speak of "earnings" as dividends, yet the meaning is plain; it was to continue to the personal representative of the deceased stockholder the right to participate in "earnings." It was not the intent that the surviving owners should determine the amount to be paid the plaintiff and so be the judges in their own case. The use of the word "earned" furnishes the test of the meaning of the contract. It was the obvious intent of the parties that plaintiff should receive her share of the earnings of the corporation, and the contract imposed on the defendants, the surviving directors of the company, the duty to the plaintiff to declare those earnings in dividends, and share the same with her. The rule of law which confides to the directors of a corporation the power to determine what dividends shall be declared, will not avail to confer on them the power to commit a fraud. (*Smith v. Moore*, 199 Fed. Rep. 689, and cases there cited.) The directors hold a fiduciary relation to the stockholders. (*Bosworth v. Allen*, 168 N. Y. 157, 165.) For a trustee to abuse his power to his own benefit is a constructive fraud, and the same principle is applicable to the conduct of directors of a corporation. In this case a fiduciary relation existed between the defendants as directors and the plaintiff. Although the contract provides that the stock should, on death of one of the parties thereto, become the absolute property of the other parties, yet it was to be held by the representative of the deceased as collateral security for the payments to be made including those derived from the earnings of the company; and in the provision securing to such representative a share in the dividends declared and "earned" it is expressly provided that it is to be divided in proportion to their "interests" in the stock. The representative of the deceased has such an interest in the stock as enables her to secure compliance

✓ with the provisions of the contract. As the parties to the action are the complete owners of the corporation, there is no reason why the exercise of the power and discretion of the directors cannot be controlled by valid agreement between themselves, provided that the interests of creditors are not affected. (*Groh's Sons v. Groh*, 80 App. Div. 85; *Spencer v. Lowe*, 198 Fed. Rep. 961; *Fougeray v. Cord*, 50 N. J. Eq. 185; *Logan v. New York Sugar Refining Co.*, 176 App. Div. 660.) If it be necessary to compel the defendants as directors to declare dividends in order to prevent them from abusing their power to the injury of the plaintiff, we think this court has power to make such a judgment. (*Hiscock v. Lacy*, 9 Misc. Rep. 578, and cases there cited.)

This action may be maintained on the analogy of a suit for specific performance of the contract.

The orders should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., STAPLETON, MILLS and PUTNAM, JJ., concurred.

Orders affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN F. TAPPIN, Relator, v. JAMES C. CROPSY, as Police Commissioner of the City of New York, Respondent.

Second Department, May 18, 1917.

Municipal corporations — city of New York — certiorari — review of determination of police commissioner dismissing relator from police department — effect of prior determination and statements by police commissioner.

Where, on certiorari to review the proceedings of the police commissioner of the city of New York in dismissing the relator from the police department, it appears that said commissioner, prior to the hearing, possessed information establishing the falsity of the relator's answers which was not accessible to the latter, and had also told him that if he made "any untruthful statement" in answer to inquiries as to whether he had given certain orders to his men he would "break" him, the determination should be annulled and the proceeding remitted for a new trial.

PUTNAM, J., and JENKS, P. J., dissented, with opinion.

App. Div.]

Second Department, May, 1917.

CERTIORARI issued out of the Supreme Court and attested on the 26th day of April, 1911, directed to James C. Cropsey, as police commissioner of the city of New York, commanding him to certify and return to the office of the clerk of the county of Kings all and singular his proceedings had in dismissing the relator from the police department of the city of New York.

Harry Crone [*Francis Gilbert* with him on the brief], for the relator.

Edward A. Freshman [*Lamar Hardy, Corporation Counsel*, and *Thomas F. Magner* with him on the brief], for the respondent.

PER CURIAM:

Before the charges were made, the police commissioner said to the relator, while inquiring as to whether he had given certain orders to his men, "any untruthful statement you make to me will break you. * * * I will just say to you once more that I have information absolutely reliable to the contrary, and you can sit there and deny it if you want to, in the face of it; you will suffer the penalty. * * * I know what I am talking to you about, what you said to the men about complaints, because I have got that down in black and white, by the examination of the men themselves, and I guess I believe what they said rather than what you said." The hearing upon charges for making untruthful answers to the commissioner was subsequently had before him in his judicial capacity, and without imputing any improper motive or unfairness to the commissioner, because under the charter (Laws of 1901, chap. 466, § 300, as amd. by Laws of 1904, chap. 341; Id. § 302)* the duty of passing upon the question as to whether an officer against whom charges have been preferred is upon him, nevertheless, in view of the said information which the commissioner possessed and which was not accessible to the relator, and his pre-existing determination as expressed by the commissioner in case relator denied, we feel that relator has not had that hearing which the law contemplates.

* See Laws of 1915, chap. 310, since amdg. § 302.—[REP.]

Under the circumstances, the determination is annulled, writ sustained, and the proceeding remitted to the commissioner for a new trial, costs to abide the event.

THOMAS, MILLS and RICH, JJ., concurred; PUTNAM, J., read for confirmation, with whom JENKS, P. J., concurred.

PUTNAM, J. (dissenting):

In cautioning relator that any untruthful answers would "break" him, the commissioner made known to the accused in plain speech the materiality of the questions he was asking, and the penalty for evasions or false denials. More formal warnings in court language might be less clear to one unfamiliar with legal terms. The commissioner at times may himself learn of complaints against a member of the force. The things here charged were public, having been spoken before the police platoon. It was fair to tell the accused that the commissioner knew this, so that the relator should consider better how to weigh his answers. Hence by this preliminary hearing, I think the commissioner did not become disqualified.

JENKS, P. J., concurred.

Determination annulled, writ sustained, and proceeding remitted to the commissioner for a new trial, costs to abide the event.

In the Matter of Proving the Last Will and Testament of MARY HERMANN, Formerly Known as MARY GOETZ, Deceased.

KATE LUDWIG and CHRISTOPHER HERMANN, Appellants;
GEORGE HERMANN, Respondent.

Second Department, May 18, 1917.

Surrogate — jurisdiction on probate of will — equitable jurisdiction — Code of Civil Procedure, sections 2510 and 2614, construed — effect of amendments of 1914 relating to Surrogates' Courts — effect of prior joint will — jurisdiction of surrogate to consider or act upon prior joint will or contract — duty of surrogate to admit last will to probate — jurisdiction to vacate or set aside decree — petition.

It is the duty of a surrogate to admit to probate the will of a decedent last executed in point of time, if the testator was competent to make it, and it was executed in conformity with the requirements of the statute, and

App. Div.]

Second Department, May, 1917.

it is not within his power to pass upon the question of whether the decedent had the right to execute such will because of a previous agreement to the contrary. If such an agreement exists, that fact and its legal results can only be determined by the Supreme Court in a suit in equity, and the manner of determination is not to admit a former will to probate, although such former will is the result of a contract between the testator and a third party governing the testamentary disposition of their property, but to sustain the contract if established by clear and convincing testimony and supported by an adequate consideration and compel its performance by the heirs of the decedent or otherwise grant adequate relief. This rule has not been changed by section 2510 of the Code of Civil Procedure as amended in 1914.

The words "competent" and "restraint," as used in section 2614, providing that "If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid," have no reference to conditions caused by or arising from the prior execution of a joint will or contract, but refer and are limited to mental competency and restraint exercised upon a testator at the time of the preparation and execution of the will offered for probate.

The general phrases of section 2510 of the Code of Civil Procedure by which equitable jurisdiction is given to surrogates are limited to its exercise in cases (1) when the question acted upon is "necessary to be determined in order to make a full, equitable and complete disposition of the matter" being considered and upon which they are called to act in determining the presented questions; and (2) in the manner prescribed by statute.

Now, as before the enactment of section 2510, surrogates must admit to probate the last will of a decedent proven to their satisfaction to comply with the provisions and requirements of section 2614, and any contract for a different disposition of the property of the testator must, if enforceable, be established in and enforced by a suit in equity in the Supreme Court against the heirs, devisees and legatees of the testator.

Hence, in a proceeding for the probate of a will, the surrogate has no jurisdiction to consider or act upon a prior joint will which had been revoked by express provisions in the later one sought to be probated.

The mere fact of the joint will having been executed does not constitute it an irrevocable contract restraining the decedent from executing another and later will, changing the disposition made of her estate.

So far as Surrogates' Courts are concerned, there are no irrevocable wills.

Subdivision 6 of section 2490 of the Code of Civil Procedure contains the only authority possessed by surrogates to open, vacate or set aside a decree granted and entered in their courts and to grant a new trial or hearing.

The exercise of such power must be based upon the existence of fraud, newly-discovered evidence, clerical error "or other sufficient cause."

Petition to vacate and to set aside a decree admitting a will to probate held not to aver the existence of either of the grounds to which the power of the surrogate to act is limited, and not to excuse the petitioner's default.

SEPARATE APPEALS by Kate Ludwig and another from a decree of the Surrogate's Court of the county of Queens, entered in the office of said Surrogate's Court on the 23d day of May, 1916, denying probate to the instrument dated the 10th day of July, 1914, and offered as the last will and testament of Mary Hermann, deceased. Also appeals by said parties from a decree entered in the office of said Surrogate's Court on the 11th day of July, 1916, admitting to probate an instrument dated the 20th day of September, 1895, as the last will and testament of Mary Hermann, deceased, with notice of a decision to bring up for review an order of said Surrogate's Court entered therein on the 21st day of October, 1915, vacating and setting aside a prior decree admitting to probate the instrument dated the 10th day of July, 1914, and permitting the respondent to file objections to the probate thereof.

The decedent and one Christopher Goetz were married on July 6, 1873, and the appellants are the issue of that union. Sometime later Mrs. Goetz and her husband separated, and she and the respondent began living together as husband and wife. Later, in 1890, they were married, but the marriage was void because the decedent had a husband living, from whom she had not been divorced. On September 30, 1895, the decedent and the respondent executed a joint will, in which she is described as his wife, by the provisions of which there was devised and bequeathed to the survivor "all and any real and personal property either owned by us jointly or severally for his or her own use and benefit forever." On July 10, 1914, the decedent executed a last will and testament in and by which she bequeathed to two granddaughters several articles of personal property, and bequeathed and devised all the rest, residue and remainder of her estate to her children, the appellants, and appointed a nephew, John F. Klein, sole executor. In the 6th subdivision of this will she says: "The reason I do not make any bequest to my dear husband George Hermann is that he has ample means of his own and for no other reason." The 8th subdivision is: "Hereby revoking all other and former Wills heretofore made by me, I again declare this and only this as my Last Will and Testament."

The surrogate found that the respondent did not know

App. Div.]

Second Department, May, 1917.

of the making of this last will and did not consent to a revocation of the joint will of 1895. Both wills were drawn and witnessed by one Hugo Cohn, who could not be found when the proceedings for probate were pending, and his testimony was dispensed with. The testatrix died on May 10, 1915, and shortly thereafter said Klein petitioned the Surrogate's Court for the probate of the will of 1914, and the respondent executed a waiver of the issuance and service of a citation and consented that the same be admitted to probate. Until later, learning that the decedent's husband, Goetz, was still living and that the respondent was not her husband, Klein returned this waiver and consent to the respondent and caused a citation to be issued, returnable June 15, 1915, which was personally served on the respondent on June 3, 1915. He made no appearance and filed no objections, and on the return of said citation the will of 1914 was admitted to probate and on June twenty-second letters testamentary issued to Klein. On August ninth, following, the respondent presented to the Surrogate's Court a petition in which he set forth that substantially all of the estate left by the deceased was his actual and lawful property, purchased with his individual money; that after her death he first learned that he was not her legal husband; that at the time of executing the will of 1914 the testatrix was seriously ill and was unduly influenced in the making of the same by her son and daughter, the appellants; that she never informed him of her intention to execute such will; that he never consented thereto or had knowledge thereof and never consented to a revocation of the joint will; that the will of 1914 was not the last will and testament of the testatrix; that after her death he "was greatly grieved, distressed in mind and body, and did not have knowledge of some of the facts heretofore set forth, and had no knowledge of the legal meaning of the said alleged Last Will and Testament, and could not have ascertained some of the facts heretofore set forth prior to the probate of said instrument purporting to be a will and testament, with due diligence, and could not have learned other facts because of his said condition," and he asked for an order restraining Klein as executor from collecting or paying over money except to conserve the interests of the estate and for an order to show cause why the probate

of said will should not be vacated and set aside and leave given him to file objections to the probate thereof. An order was accordingly granted, directed to Klein, the appellants, John C. Goetz, the husband, and the legatees under said will, requiring them to appear in said court on September 14, 1915, and show cause why the probate of said will should not be vacated and set aside and why the respondent should not be permitted to file objections to the probate thereof, and in the meantime they were restrained from paying out or disposing of any money or property in their possession, belonging to the estate, except to conserve the interests thereof. On the return of the order to show cause, an order was granted vacating and setting aside said probate and permitting the respondent to file the following objections:

"First. That the said instrument is not the Last Will and Testament of Mary Hermann, formerly known as Mary Goetz, deceased.

"Second. That the said Last Will was not duly executed as required by law.

"Third. That the said Mary Hermann, formerly known as Mary Goetz, was not at the time of the making of said alleged will capable of making a will.

"Fourth. That the said Mary Hermann, formerly known as Mary Goetz, was not at the time of the making of said alleged will legally capable of making a will and was restrained therefrom by reason of her having entered into a joint and mutual will with said George Hermann, known as the last will and testament of George Hermann and Mary Hermann, his wife, and drawn and duly executed by both parties at her request, which said Last Will and Testament has never been revoked and is dated the 30th day of September, 1895. That the said George Hermann has never consented to the revocation of the said joint and mutual Last Will and Testament entered into between him and the deceased, Mary Hermann, formerly known as Mary Goetz and was never consulted with reference thereto, and has had no knowledge of the existence of the alleged Last Will and Testament of Mary Hermann, formerly known as Mary Goetz, offered for probate until same was exhibited to him subsequent to her death, and was never consulted in reference thereto."

App. Div.]

Second Department, May, 1917.

Objection was made by the proponent that the surrogate had no jurisdiction to hear and determine the question raised by the fourth objection. Such objection was overruled and the surrogate assumed jurisdiction, as he says, "both legal and equitable, to hear and determine all of the questions raised by the objections." He found that the will of 1914 was made and duly executed by the testatrix; that she was capable of making a will; that both wills were executed in full compliance with the statutory requirements, and refused probate to the will of 1914 and admitted to probate the joint will for the reasons that at the time of the execution of the will of 1914 the testatrix "was not legally capable or competent to make a will, in that she was restricted and restrained therefrom by reason of having entered into a joint and mutual will with contestant George Hermann, which said joint and mutual will was dated September 30th, 1895, and was a good and valid contract and made for a valuable consideration and has never been revoked or revocation thereof consented to by contestant George Hermann."

Charles L. Hoffman [*Henry A. Friedman* with him on the brief], for the appellant Ludwig.

Howard C. Taylor, for the appellant Hermann.

Meier Steinbrink [*Sydney Rosenthal* with him on the brief], for the respondent.

RICH, J.:

The conclusions of the learned surrogate are based upon the provisions of section 2510 of the Code of Civil Procedure. In his opinion assuming jurisdiction, he said: "I am convinced that under section 2510 the surrogate has full power to determine all legal and equitable questions submitted to it regarding the probate of wills. Section 2510 provides that the surrogate has full, complete and equitable power and subdivision 1 further states 'to admit wills to probate.' Section 2614 provides that before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances and further must determine that the testator at the time of executing it was in all respects com-

petent to make a will and not under restraint. * * *

It would seem, therefore, that the surrogate has full power both equitable and legal to inquire into the facts and circumstances in such a case as the one at bar." In the conclusion as to the extent of his equitable powers and jurisdiction, the learned surrogate was in error. The disposition of this appeal is controlled by the decision of this court in *Matter of Holzworth* (166 App. Div. 150; 215 N. Y. 700), in which the equitable powers of Surrogates' Courts under the provisions of section 2510 of the Code of Civil Procedure were considered, and we reached a conclusion adverse to that held by the surrogate. In that case the question was whether, under the provisions of section 2510, full equity jurisdiction was given to Surrogates' Courts to determine all questions legal and equitable upon the facts presented to them. Mr. Justice CARR, writing for the court, after quoting the provisions of the section referred to, says: "But this legislative declaration is followed immediately by language as follows: 'And in the cases and in the manner prescribed by statute' [then follows a quotation of the third and fourth subdivisions]. As I understand the law of statutory construction, all general phrases in a statute must yield to a particular specification contained in the same statute. As to the subdivisions of section 2510, just quoted, the cases and the manner in which the surrogate may exercise his equitable jurisdiction are specified particularly. Where there is such a specification, it must exercise its jurisdiction in accordance with the specification. Its general equitable power must yield to the statutory restrictions upon it or directions as to it, and where the statute prescribes when and how it shall act, it cannot act otherwise than is prescribed. I think this is so well settled, even as to courts of general equitable jurisdiction, as to require no discussion." Commenting on this opinion, KETCHAM, Surrogate, in *Matter of Kenny* (92 Misc. Rep. 330, 338) correctly says: "It is useless to argue that in the opinion quoted there was any thought that the particular provision of the statute which restricted the general power was to be found in section 2510. There was no restriction or specification in that section as to distribution in kind. The only suggestion in any of its subdi-

App. Div.]

Second Department, May, 1917.

visions 1 to 8 as to qualifications of any of the powers therein contemplated was that such qualifications were to be looked for in statutes other than the section itself. * * * As to restraints upon the treatment of these subjects, the only reference is contained in the words 'in the cases and in the manner prescribed by statute,' language plainly postponing the mind to instances and methods to be sought outside of the section itself. In section 2736, one of these other statutes, there is the definite restriction with respect to distribution *in specie* which nobody can discover in these subdivisions 1 to 8. That was the restriction which the court found. It was that upon which the court had commented as the only specific regulation of the surrogate's power, unless some other provision was found in section 2510. While the opinion quotes subdivisions 3 and 4 of section 2510 they are quoted only to introduce and give meaning to section 2736."

Prior to the amendment of 1914 (Laws of 1914, chap. 443), it was uniformly held by our courts that it was the duty of a surrogate to admit to probate the will of a decedent last executed in point of time, if the testator was competent to make it and it was executed in conformity with the requirements of the statute, and it was not within his power to pass upon the question of whether the decedent had the right to execute such will because of a previous agreement to the contrary. If such an agreement existed, that fact and its legal results could only be determined by the Supreme Court in an action in equity, and the manner of determination was not to admit a former will to probate, although such former will was the result of a contract between the testator and a third party governing the testamentary disposition of their property, but to sustain the contract, if established by clear and convincing testimony and supported by an adequate consideration and compelling its performance by the heirs of the decedent, or otherwise granting adequate relief. This rule has not been changed by section 2510 of the Code. Section 2614 of the Code of Civil Procedure (formerly section 2623, the wording about to be quoted being the same) provides in part: "If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint;

it must be admitted to probate as a will valid." The words "competent" and "restraint," used in this section, have no reference to conditions caused by or arising from the prior execution of a joint will or contract, but refer and are limited to mental competency, and a restraint exercised, at the time of the preparation and execution of the will offered for probate, upon the testator by relatives or third persons, leading to and overcoming his free will in the testamentary disposition of his property. While the provisions of section 2510 enlarged the jurisdiction of surrogates by general phrases giving them the power to "try and determine all questions, legal or equitable, * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires," such provision is followed by the words, "And in the cases and in the manner prescribed by statute: 1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship." The general phrases contained in this section by which equitable jurisdiction was given surrogates, are limited to its exercise in cases, (1) when the question acted upon was "necessary to be determined in order to make a full, equitable and complete disposition of the matter" being considered, and upon which they were called to act in determining the presented questions; and (2) in the manner prescribed by statute. In the case at bar the only questions presented to the surrogate and to be determined by him in the proceeding commenced by the petition of Klein to probate the will of 1914, were whether the testatrix was at the time of its execution mentally competent to make a will; whether such instrument was her will and voluntary act, uninfluenced by undue solicitation or restraint, and whether it was executed in conformity with statutory requirements. (See Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 21; formerly 2 R. S. 63, § 40.) To determine these questions there was no necessity for the surrogate to consider or act upon the former joint will, which had been revoked by express provisions in the later one; but if it was permissible for him to exercise the equity powers conferred upon surrogates by section 2510 of the Code, such power and jurisdiction were limited to the

App. Div.]

Second Department, May, 1917.

extent, and could only be exercised in the manner, prescribed by statute. Under the requirements of section 2614, it was his duty, upon the facts presented, and found by him, to admit the later will to probate, leaving the respondent to the enforcement of his legal rights under his contract, if any existed, by an action in equity in the Supreme Court. The surrogate's decision, and the decrees appealed from, rest upon the conclusion that the mere fact of the joint will having been executed constituted it an irrevocable contract restraining the decedent from executing another and later will changing the disposition made of her estate. This view is erroneous. So far as Surrogates' Courts are concerned, there are no irrevocable wills. As Judge MILLER, writing for the Court of Appeals, said in *Rastetter v. Hoenninger* (214 N. Y. 66, 71): "As a will an instrument is revocable at pleasure, but as a contract, if supported by an adequate consideration, it is enforceable in equity." Now, as before the enactment of section 2510, surrogates must admit to probate the last will of a decedent, proven to their satisfaction to comply with the provisions and requirements of section 2614, and any contract for a different disposition of the property of the testator must, if enforceable, be established in and enforced by an equity action brought in the Supreme Court against the heirs, devisees and legatees of the testator. The construction of section 2510 contended for by the respondent and sustained by the surrogate, would present a very grave question as to its unconstitutionality, possibly requiring its condemnation on that ground.

The order brought up for review was erroneously granted. Subdivision 6 of section 2490 of the Code of Civil Procedure contains the only authority possessed by surrogates to open, vacate or set aside a decree granted and entered in their courts, and to grant a new trial or hearing. The exercise of such power must be based upon the existence of fraud, newly-discovered evidence, clerical error "or other sufficient cause." (*Matter of Hawley*, 100 N. Y. 206; *Matter of Clapp*, 97 Misc. Rep. 576, 578.) In *Matter of Tilden* (98 N. Y. 434) it was held that the words "or other sufficient cause" in this section (formerly subdivision 6 of section 2481) meant and were limited to "causes of like nature with those specifically named."

The petition of the respondent to vacate and set aside the decree by which the will of 1914 had been admitted to probate, open the proceeding and permit him to file objections, does not aver the existence of either of the grounds to which the power of the surrogate to act was limited, and did not excuse his default; he did not deny that he had executed a waiver of the issuance and service of citation after being made acquainted with the provisions of the will, and consented in writing that it be admitted to probate, or that, after he had done so, he was duly personally served with the citation issued; no valid grounds of objection, within the jurisdiction of the surrogate, were presented, and the decree previously granted, admitting the will of 1914 to probate, should not have been set aside.

It is not necessary to consider whether the facts before the surrogate justified the conclusions as to the legal effect upon the parties arising from the execution of the joint will, or their respective rights and disabilities thereunder, because, having no jurisdiction to entertain and determine such questions, his conclusions thereon are immaterial.

It follows that both of the decrees of the Surrogate's Court of Queens county, and the order brought up for review, must be reversed, with costs, and the decree of June 19, 1915, admitting to probate the will of 1914, reinstated with the same force and legal effect in all things as if it had not been vacated and set aside.

JENKS, P. J., THOMAS, STAPLETON and BLACKMAR, JJ., concurred.

Decrees and order of the Surrogate's Court of Queens county reversed, with costs, and decree of June 19, 1915, admitting to probate the will of 1914, reinstated with the same force and legal effect in all things as if it had not been vacated and set aside.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
LAURA WHITMAN, Appellant.

Second Department, May 18, 1917.

Crime — Penal Law, section 720, relating to disorderly conduct in public places construed — use of offensive language by person on own private property not a violation of statute — slander.

The words "in any place," as used in section 720 of the Penal Law providing that "Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person in any place * * *, shall be deemed guilty of a misdemeanor," do not apply to disorderly acts or language by a person while upon his own private property. In order to constitute an offense, the acts committed or language used must have been committed or used in a public place.

Hence, a woman who, while standing in her private residence, no person other than herself and husband being upon her premises, addressed offensive words to another woman and her husband who were in their rear yard adjoining, and such words were spoken in such a tone of voice that they could not be distinguished by others, is not guilty of a violation of the statute.

Such acts at most constitute mere slander for which the aggrieved party may have a civil remedy.

JENES, P. J., and PUTNAM, J., dissented.

APPEAL by the defendant, Laura Whitman, from a judgment of the County Court of Nassau county, entered in the office of the clerk of said county on the 25th day of March, 1916, affirming a judgment of the police justice of the village of Freeport, convicting the defendant of violating section 720 of the Penal Law.

Harry G. Clock, for the appellant.

Charles I. Wood, Assistant District Attorney [*Lewis J. Smith*, District Attorney, with him on the brief], for the respondent.

RICH, J.:

This matter is brought before the court upon a certificate of reasonable doubt, and presents an appeal by the defendant from a judgment of the County Court of Nassau county, affirming her conviction of a violation of the provisions of section 720 of the Penal Law.

Two questions require consideration and determination: (1) Do the words "in any place," as used in that section of the statute, apply to disorderly acts or language by a person while upon his own private property? (2) if not, and it be held that such acts must be committed, and language used, in a public place, to constitute an offense under the statute, does the proof establish that the defendant used the language and committed the acts with which she is charged, in a public place?

The information charges that the defendant, on the 3d day of December, 1915, "on Raynor Avenue, in the incorporated Village of Freeport * * * did commit the crime of annoying and interfering with a person by offensive and disorderly acts and language in violation of Section 720 of the Penal Law of the State of New York, by maliciously, wilfully, wrongfully and unlawfully calling informant and informant's wife vile, indecent, offensive and opprobrious names and accusing deponent and his said wife of being criminals and bastards." The evidence of the People shows that foul and indecent language was used by the defendant while standing in the back kitchen doorway, and at a window, of her own residence, the complainant and his wife, to whom such language was addressed, being in the back yard of their residence lot, which joins that of the defendant on the north. Sections 43 and 720 of the present Penal Law were formerly united in section 675 of the Penal Code, and the words "in any place," then contained therein and now forming part of that portion of the section retained in section 720 of the Penal Law, upon which this conviction is based, were construed in *People v. St. Clair* (90 App. Div. 239) and held to have reference only to a public place. The court said that in order to establish the offense mentioned in the section "There must be an annoyance to or interference with some person in a public place by act or language which is either offensive or disorderly." Such statement correctly expresses the legal construction to be given the language used in section 720 of the Penal Law, and, in order to constitute an offense under its provisions, the acts committed or language used must have been committed or used in a public place.

A public place is, generally speaking, "A place openly

App. Div.]

Second Department, May, 1917.

and notoriously public, a place of common resort; a place where all persons have a right to go and be; a place which is in point of fact public, as distinguished from private — a place that is visited by many persons, and usually accessible to the neighboring public; every place which is for the time made public by the assemblage of people.” (32 Cyc. 1249.)

While a place not public in the sense in which that word is generally used may, under certain circumstances, be held to be a public place within the meaning of those words as used in a statute, there is no proof in the case at bar, or in the definition of those words to which our attention is called or which we have been able to find, which permits a holding that the defendant in the case at bar spoke the words charged in a public place. She spoke them while standing in her private residence, no person other than herself and husband being upon her premises, and addressed them to the complainant and her husband, who were in a rear yard adjoining their private residence property; the words were spoken in a tone of voice that did not permit her neighbor on the south, 125 feet away, to distinguish what she said.

Although the learned County Court in its opinion says “that persons passing along the street could hear it,” and that the defendant’s house was situate on “a public street in the Village of Freeport,” I am unable to find any proof sustaining such statements. There is no proof that Raynor avenue is a public street, or that there was any public street in the vicinity of defendant’s premises; there is no proof of the distance from Raynor avenue to the window or back kitchen door of defendant’s house in which she was standing while talking, or that the place where she stood was visible from any street; there was no assemblage of people on either the defendant’s or complainant’s property; the public had no right to resort to or be thereon; there is no proof that what defendant said was or could be heard by a passerby on Raynor avenue, and the case at bar is, therefore, removed from the operation of the rule declared in the cases cited by the learned district attorney.

The offense of which the defendant has been convicted was not committed in a public place and did not constitute an offense under the provisions of section 720 of the Penal

Law, but is at the most a mere slander, for which the aggrieved party may have a civil remedy but which does not constitute a crime punishable under the criminal law. It follows that the judgment appealed from must be reversed.

The judgment of the County Court of Nassau county should be reversed, information dismissed, defendant's bail exonerated, and defendant discharged from custody.

MILLS and BLACKMAR, JJ., concurred; JENKS, P. J., and PUTNAM, J., voted to affirm.

Judgment of conviction of the County Court of Nassau county reversed, information dismissed, defendant's bail exonerated, and defendant discharged from custody.

WILLIAM RANDALL & SONS, INC., Respondent, v. GARFIELD WORSTED MILLS, Appellant.

Second Department, May 18, 1917.

Sale — action for goods sold and delivered upon sample — oral stipulation between parties for examination by experts of samples and making their report final — summary enforcement of stipulation — order of court not conforming to stipulation modified.

Where, in an action to recover the purchase price of several barrels of paste sold and delivered by plaintiff upon sample, the sole question presented is whether the paste delivered is equal in quality to the sample and the parties during the trial of this issue enter into an oral agreement in open court, with the consent and approval of the presiding justice, whereby each side is to select an expert chemist for the purpose of examining the paste, and the result of such examination is to be submitted to the parties through their respective attorneys and accepted if the experts agree, and if they do not agree a third expert is to be selected, and the report of the majority taken as final, such agreement is binding upon the parties and concludes the court whose duty it is as between the parties to enforce and effectuate it.

Such agreement being undisputed and proper, may be summarily enforced by motion.

Although oral, it is just as obligatory, conclusive and enforceable as though it had been reduced to writing and executed with every legal formality.

But the agreement enforced must be, in all its material details, that which the parties entered into, the court being without power or authority to

modify, alter or change the same in any material detail against the objection of one of the parties.

Provisions of an order purporting to carry out said agreement examined, and held, not to conform thereto and not to be specific enough to fully guard and protect the rights of the parties because, *first*, it does not obligate them to accept as final the result of the tests of the two experts, if they agree, or make the report of a majority if a third one be selected, final and binding; *second*, it leaves the method of properly preparing the contents of the barrels for testing indefinite; *third*, it does not provide for notice of the time when the samples shall be taken or that both experts shall be present; *fourth*, it does not provide the place of deposit or custodian of the third set of samples during the time tests are being made by the two experts selected; *fifth*, it makes no provision for the appointment of the third expert should such appointment become necessary.

APPEAL by the defendant, Garfield Worsted Mills, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of February, 1917.

Louis H. Hall [*Henry B. Twombly* and *Edmonds Putney* with him on the brief], for the appellant.

Charles L. Withrow [*Henry J. Lucke* with him on the brief], for the respondent.

RICH, J.:

This appeal is from an order of the Special Term granting the plaintiff's motion to permit the taking of samples from each of thirty barrels of Hematine paste — a logwood extract — sold and delivered by plaintiff upon sample. The sole question presented is whether the Hematine paste contained in the thirty barrels delivered and in defendant's possession is equal in quality to the sample given it at the time the contract of sale was entered into, and upon which such sale was based. During the trial of this issue the parties entered into an oral agreement in open court, which the court, after pointing out that the point in dispute was "whether the goods sold, to wit: a number of barrels of hematine paste was equal to the sample," states as follows: "An agreement was made in open Court whereby each side was to select an expert chemist for the purpose of examining the product and the result of such examination was to be submitted to

the parties through their respective attorneys, and accepted if the experts agreed. If they did not agree a third expert or umpire was to be selected and the report of the majority, as I understood it, was to be taken as final. That is, if the article in dispute did not measure up to the sample the defendant would not be called upon to accept or pay for the goods, but, on the other hand, if it did prove equal to the sample then plaintiff would be entitled to their money." Thereupon a juror was withdrawn and a mistrial declared. Subsequently, upon motion, the learned justice before whom the trial was started held that the plaintiff should be permitted to have samples taken according to the method "proposed and agreed upon," and thereupon granted the order appealed from, which, so far as material, provides: "That the defendant permit an expert chosen by the plaintiff herein and an expert to be chosen by the defendant herein, access to the thirty (30) barrels of Hematine above referred to and now in the possession of the defendant, and to take three (3) samples from each of said barrels of Hematine after properly preparing the same for testing; and it is further ordered, that the expert for the plaintiffs make tests from one of said samples so taken, and the expert for the defendant make tests from another of said samples, and that the third sample be sealed by both experts and kept by them without the seals being disturbed to be used if necessary as hereinafter provided; and it is further ordered, that in the event that the tests separately conducted by said experts fail to agree and said experts are unable to agree, that said experts choose a third expert to whom shall be delivered the third sample hereinbefore referred to and that said third expert shall make tests from said third set of samples; and it is further ordered, that the said experts be chosen by the respective parties herein within ten (10) days from the date of entry and service of a copy of this order with notice, and that within ten (10) days after said date the two aforesaid experts complete their tests; and it is further ordered, that in the event that a third expert is chosen, that he shall make his tests within five (5) days from the date of the receipt of the samples by him." It appears that in order to obtain proper samples for a fair test, it is necessary that the contents of each of the thirty

barrels be thoroughly stirred and mixed to unite the sediment in each barrel with the other contents before samples are taken therefrom.

The appellant expressly concedes that the agreement made by the parties in open court was as stated by the learned justice, and the respondent does not materially differ therefrom. The agreement entered into in open court with the consent and approval of the presiding justice, is binding upon the parties and concluded the court, whose duty it was, as between the parties, to enforce and effectuate it. (*Matter of New York, L. & W. R. R. Co.*, 98 N. Y. 447, 453, and cited cases; *Dubuc v. Lazell, Dalley & Co.*, 182 id. 482, 486; *Matter of Clark*, 168 id. 427; *Potter v. Rossiter*, No. 4, 109 App. Div. 737, 739; *Chichester v. Winton Motor Carriage Co.*, 110 id. 78, 80.) *Greve v. Aetna Live Stock Ins. Co.* (81 Hun, 28) is not in conflict with the rule declared in the cited cases. (*Sanford v. Commercial Travelers' Assn.*, 86 Hun, 380, 382.) Such agreement, being undisputed and proper, may be summarily enforced by motion. (*Potter v. Rossiter*, No. 4, *supra*, 737.) Although oral, such agreement is just as obligatory, conclusive and enforceable as though it had been reduced to writing and executed with every legal formality. (*Matter of Baldwin*, 27 App. Div. 506, 509, and cited cases; *Smith v. Barnes*, 9 Misc. Rep. 368, 370.) But the agreement enforced must be, in all its material details, that which the parties entered into, the court being without power or authority to modify, alter or change the same (in any material detail) against the objection of one of the parties. The agreement disposed of the action absolutely. There was nothing further to litigate. As the court says: "if the article in dispute [the Hematine paste in the barrels] did not measure up to the sample the defendant would not be called upon to accept or pay for the goods, but, on the other hand, if it did prove equal to the sample then plaintiff would be entitled to their money." It seems to me, however, that the order is objectionable, as not conforming to the agreement made by the parties, and is not specific enough to fully guard and protect the rights of the parties under their agreement; *first*, it does not obligate the parties to accept as final the result of the test of the two experts if they agree, or make the report of a

majority of the experts (if a third one was selected) final and binding upon the parties; *second*, it leaves the method of "properly preparing" the contents of the barrels for testing indefinite as to time, manner and place; *third*, it does not provide for any notice to be given of the time when the samples shall be taken from the barrels or that both experts (and the parties or their representatives, if they desire) shall be present upon such occasion; *fourth*, it does not provide the place of deposit or custodian of the third set of samples during the time tests are being made by the two experts selected by the parties; *fifth*, it makes no provision for the appointment of the third expert by the court upon notice, should such appointment become necessary and the two selected experts be unable to agree upon the third expert. And in reference to the contention of the appellant that the court was without power to require it to incur the expense of employing an expert to make the tests, it is not the arbitrary requirement of the court against the wishes of the appellant. On the contrary, the requirement was its suggestion and upon its agreement made in open court, which it was the duty of the court to enforce in the manner agreed upon by the parties.

The order is modified, *first*, by striking out the words "after properly preparing the same for testing," and inserting in lieu thereof the specific method and manner in which the contents of each barrel of the Hematine paste shall be prepared for testing (before samples are taken therefrom) to produce a complete, correct and uniform sample of the entire mixture contained therein; *second*, a provision that the samples shall be taken from each and every barrel, upon notice to the parties, at the same time and in the presence of the two selected experts of the parties, and representatives of the parties, if they attend at the time and place specified in such notice; *third*, a provision designating the person or corporation with whom the third sealed samples shall be deposited during the time the selected experts of the parties are making their tests, and the manner and time within which such sealed samples shall be delivered to the third expert, should one be appointed; *fourth*, a provision that should the tests made by the two selected experts not agree and they are unable within a time stated to agree upon the third expert, such

App. Div.]

Second Department, May, 1917.

third expert shall be appointed by the court on ten days' notice of the application therefor, given by either party to the other; *fifth*, a provision that if the tests made by the two selected experts agree, the result shall be accepted by and conclusive upon the parties, and if they do not agree the report of a majority of the three experts provided for in writing shall be final and conclusive upon the parties; *sixth*, the order should provide for the payment of the fees and disbursements of the third expert, should one be appointed, by the party failing to sustain its contention as evidenced by the result of the tests made. As so modified, the order is affirmed, without costs, and may be settled on notice.

JENKS, P. J., THOMAS, MILLS and PUTNAM, JJ., concurred.

Order modified in accordance with opinion, and as modified affirmed, without costs. Order to be settled on notice.

FREDERICK W. SWIFT, Respondent, v. THE MATTHEWS
ENGINEERING Co., Appellant.

Second Department, May 18, 1917.

Process — service of summons in this State on managing agent of foreign corporation — failure to use diligent efforts to serve officers.

Where a foreign corporation, although not authorized to transact business in this State and not having designated a person upon whom service of process can be made, has an office in the city of New York where a sales manager transacts a continuous and permanent course of business, employing several agents to solicit and forward orders to it, which are filled from its plant in the foreign State, a summons in an action for services alleged to have been rendered may be served upon said sales manager as a "managing agent;" but said service is invalid where it appears that the plaintiff made no prior effort personally to serve in this State any of defendant's officers mentioned in subdivision 1 of section 432 of the Code of Civil Procedure.

Service of a summons upon the managing agent of a foreign corporation in this State can only be resorted to and made effectual as the commencement of an action against the corporation, in a court of this State, after diligent efforts to obtain personal service upon one of such officers therein has been made and failed.

APPEAL by the defendant, The Matthews Engineering Co., from an order of the Supreme Court, made at the Dutchess Special Term and entered in the office of the clerk of the county of Dutchess on the 27th day of February, 1917, denying its motion to set aside the service of the summons herein on the ground that the person served was not a proper person to be served under the provisions of section 432 of the Code of Civil Procedure.

Charles J. Holland, for the appellant.

N. Otis Rockwood [*M. Glenn Folger* with him on the brief], for the respondent.

RICH, J.:

The defendant, a foreign corporation having its principal place of business in the State of Ohio, is doing business here, although no certificate authorizing it to transact business in this State has been filed and no person designated upon whom service of process could be made. The action is for services alleged to have been rendered to the defendant and its predecessor, as a salesman in selling light and power plants. The defendant corporation is listed in the New York Telephone directory, under its corporate name, the location and place of business being given as its New York office. The summons was served on one Meegan, defendant's sales manager, who had, in the office where the service was made, one of its plants which he exhibited in operation. He had a number of sales agents operating under him, taking orders for plants, which were subject to the approval of defendant at its home office in Ohio. The defendant is not shown to own any property in this State; its office furniture and equipment, with the exception of its exhibition plant, being leased. There is no proof of any effort made by the plaintiff to serve the officers of the corporation within this State. Under the authority of *Tauza v. Susquehanna Coal Co.* (220 N. Y. 259), it must be held that the defendant did business in this State and that the service upon Meegan was valid and effective, so far as service upon a manager of a defendant corporation is made valid by law. In that case, and also in *International Harvester v. Kentucky* (234 U. S. 579), therein quoted and cited with

App. Div.]

Second Department, May, 1917.

approval, it was held that the activities of a foreign corporation, exercised through appointed sales agents, being systematic and regular, were sufficient to subject such corporation to the process of the courts of the State in which such activities were exercised. In the case at bar there was a continuous and permanent course of business transacted by defendant in this State. It is shown that there was a continuous employment of several agents to solicit and forward orders to defendant, which were filled from its manufactory in Ohio, which seems to constitute that "fair measure of permanence and continuity" and "systematic and regular" activities which gives jurisdiction to our courts. Meegan is shown to have been a sales agent in charge of defendant's New York office, and in his letter to the plaintiff regarding his employment by the defendant, written upon its letterhead in which it is stated that defendant has one of its plants in operation at its New York office and that F. W. Meegan is its eastern manager, he says: "I have arranged for representation in part, if not all, of the territory formerly allotted to you. Under the circumstances I do not see my way clear to rescind the arrangements recently entered into with other parties." The letter was signed "The Matthews Engineering Co., F. W. Meegan." It is contended that the letter is not the defendant's; that Meegan for his own convenience, and without authority, took a letterhead of "The Matthews Company," defendant's predecessor, and caused to be printed upon it the words "The Matthews Engineering Co., Successors to," above the words "The Matthews Company," and that the appellant never saw this letterhead and did not know of its existence. One difficulty with this contention, as well as many others advanced by the learned counsel for the defendant, is that they are not supported by any evidence. There is no proof that the defendant did not know of the declarations and acts of its agent. It is a fair and warranted presumption that it did.

Although the facts and presumptions are sufficient to support the respondent's contention as to the defendant's doing business in this State, and that Meegan at the time of the service of the summons upon him was the defendant's "managing agent" within the meaning of those words as

used in the statute, the order must be reversed upon the authority of *Gursky v. Blair* (218 N. Y. 41), for the reason that it does not appear that the plaintiff made any effort, or used any diligence to personally serve any of defendant's officers (mentioned in subdivision 1 of section 432 of the Code) in the State of New York before serving Meegan. It is the settled law that service of a summons upon the managing agent of a foreign corporation in this State can only be resorted to and made effectual as the commencement of an action against the corporation in a court of this State, after diligent efforts to obtain personal service upon one of such officers therein has been made and failed. In the reasoning of the court in the case last cited it is said: "So far as the papers in this case show the receivers [who were non-residents of this State] could have been served personally within the State, but no efforts to find them were made. For all that appears the receivers might have been in the New York city office when Johns was served." In the case at bar the moving affidavit of defendant's president was made in the city of New York, and (adopting the reasoning of the court in the case cited) for all that appears he or one or more of defendant's officers might have been in defendant's New York office when Meegan was served. If they were in the State, even temporarily, where personal service upon them of the summons might have been made, their place of residence is wholly immaterial.

The order should be reversed, with ten dollars costs and disbursements, and defendant's motion to set aside the service of the summons is granted, with ten dollars costs.

JENKS, P. J., THOMAS, MILLS and PUTNAM, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and defendant's motion to set aside the service of the summons granted, with ten dollars costs.

JOSEPHINE KNAPP LESTER, Appellant, v. GEORGE B. LESTER,
Respondent.

Second Department, May 18, 1917.

Husband and wife — divorce — modification of decree as to custody of child — evidence — effect of subsequent marriage of husband in foreign State — effect of subsequent marriage of wife — financial and social situation of parent — education of child — interest of child.

Upon a reference on a motion for the modification of a decree of divorce as to the custody of an infant, unlimited investigation into the antecedents of the parties and their respective families during the period of their differences which culminated in their separation and final divorce, aside from the guilt of the defendant proven in the divorce action, does not tend to establish that as to moral and intellectual fitness, or in parental affection, either party in comparison with the other is unworthy to have the custody of the child, in whole or in part, but merely tends to prolong the reference.

It is error on such a reference for the referee to exclude evidence establishing defendant's guilt in the divorce action and showing its character as gross and continued, and not casual, temporary and exceptional.

As a general rule, the custody of children of divorced parties, especially of the only child, will be given to the innocent party.

The remarriage in another State of the defendant in a divorce action, contrary to the decree of divorce of the court of this State, does not impair his fitness to have or share in the custody of his only infant child, but where such marriage is to a concededly respectable and worthy woman, with whom he has lived an entirely exemplary life, it may to some extent increase his fitness.

The remarriage of the plaintiff in a divorce action to an entirely worthy and respectable man does not diminish her just claim to the custody of her infant child.

The fact that the defendant in a divorce action was financially able to provide his nine-year-old daughter and only child with better educational advantages and social opportunities than the mother could furnish where she lived, is not a sufficient ground for depriving her of the custody of the child.

Where a divorced father has agreed to pay \$500 per month for the maintenance, support and education of his nine-year-old daughter until she becomes fourteen years of age, and the court has ordered that she be allowed to visit with the father at a distant place at frequent intervals, the father's request that his daughter have private instruction should be granted by the court, as attendance at any school, public or private, with such frequent interruptions would be utterly impracticable.

Although the interest of the child is the paramount consideration upon the question of its custody, it is not the exclusive consideration, and the natural right of the parent is an important factor, especially where it has not been forfeited by gross misconduct.

APPEAL by the plaintiff, Josephine Knapp Lester, from an order of the Supreme Court, made at the Rockland Special Term and entered in the office of the clerk of the county of Rockland on the 8th day of November, 1916.

Arthur E. Sutherland [*Frank S. Coburn* with him on the brief], for the appellant.

Gustav Lange, Jr., for the respondent.

MILLS, J.:

This is an appeal by plaintiff from an order made at the Rockland Special Term, November 8, 1916, amending the final decree of divorce rendered in this action in favor of the plaintiff and against the defendant, so far as it concerns the custody of their only child, a girl of about nine years of age, so as to give the general custody of the child to the defendant, the father, with merely the right of certain visitation reserved to the mother, which constitutes an exact reversal of the provision made in that decree.

The defendant's motion asked that that decree should be modified as well as to its provisions as to alimony, which had been made by means of an agreement between the parties, approved by the court, upon the ground that the plaintiff had meanwhile married another man and by such marriage had ceased to need pecuniary support from the defendant, her former husband; but the learned court at Special Term denied that part of the motion for want of power. The defendant not having appealed from the order, the latter determination is not before us for direct review.

The following is a statement of the principal facts, which are substantially undisputed.

The parties were married June 27, 1900, at the city of Auburn in this State. Each was the child of a very respectable family of good social position, but apparently of quite moderate pecuniary means, evidently of about equal station in every respect. Her family was and long had been residents of

App. Div.]

Second Department, May, 1917.

Auburn, and his of the village of Seneca Falls, some 16 miles distant, both places being about 350 miles distant from New York city. He was twenty-eight and she twenty-four years of age, and neither had been married before. Each had had a fairly good education, at least academic although not collegiate, which apparently the means of neither set of parents had warranted. The defendant, after leaving the academy, had taught school in several different places, studied law and finally been admitted as an attorney and counselor of this court in the fall of 1896 in New York city, where he last taught, and from that time had been engaged in that city in the practice of his profession. It is evident that his career, at least up to that point, had been most creditable, and that it gave good promise for a successful future. The couple at once took up their residence in New York city and continued to reside there until their separation hereinafter to be noted. Their only child, the subject of this proceeding, a girl, was born there August 23, 1907. It would seem that their married life for several years was harmonious. Meanwhile defendant's practice had grown until, about the time of the birth of the child, he became the general counsel of the Fleischmann Yeast Company and later one of its chief executive officers, which position he still occupies with a salary at present of \$60,000, the business of the company being very extensive. By December, 1910, acute differences had arisen between the parties, resulting as to him in accusations by her against him, charging him with excessive drinking and with infidelity with a certain woman, an adventuress, who he admitted had endeavored to blackmail him and who with her story had reached the ears of his wife and her brother, and with whom the husband had had some association; and in accusations by him against her, charging her with improper conduct with certain men and with indifference to her home duties. Their differences culminated in a bitter quarrel on Christmas evening, 1910, at the wife's parents' home at Auburn, where they then separated, finally as the result proved. The wife and the child, who was then a little over three years old, remained with the wife's parents at Auburn and for some five months following the defendant refused and failed to contribute anything to the support of either, insisting that

they return to his home in New York city, which the wife refused to do. In May, 1911, he threatened to take habeas corpus proceedings to obtain the custody of the child, or at least the right to visit her, which up to that time had been in effect refused to him. Through counsel, on May 26, 1911, the parties entered into a written agreement as to the custody of the child for the next three years, to the effect that the mother should have its general custody, with the right to the father to see her, the child, at all reasonable times and to have the child, not to exceed four days in every month, sent for the day to the house of defendant's brother, a doctor, in Seneca Falls, to spend the day in company with the father; and upon such conditions defendant agreed to pay the plaintiff \$200 a month for the support of the child. The agreement made no provision for the support of the wife and no contribution to that object was made by the defendant until the second agreement hereinafter recited.

On November 6, 1913, the plaintiff began in this court (Rockland county) this action for an absolute divorce against the defendant, who had continued to reside in New York city. He interposed a general denial as to the allegations of guilt in the complaint, and by consent of counsel the issues were referred and an order to that effect made by this court, at the Rockland Special Term, December 6, 1913. Both parties appeared before the referee by counsel, and evidence in behalf of the plaintiff was taken, which fully established defendant's guilt, the defendant offering no evidence in his behalf. On December 4, 1913, while the action was thus pending, the parties entered into a written agreement providing for alimony and the custody of the child, subject to the approval of the court. The substance of it was that in case divorce should be granted the plaintiff should have the general custody of the child, except that the father should have its custody for one week each month, from October to May inclusive, and two weeks each month from June to September inclusive, with the right to see the child at other times where she might be living; and that the defendant should pay to the plaintiff, in lieu of alimony and all right in his estate, the sum of \$51,500 in five annual installments, the first, of \$11,500, to be paid within ten days after the

entry of the final decree, and the other four, of \$10,000 each, to be paid annually thereafter, and all to be secured by a promissory note indorsed by Julius Fleischmann; and also that the defendant should pay the further sum of \$500 per month from the date of the entry of the interlocutory judgment, "for the education and maintenance of the said infant child and for her [meaning plaintiff's] own support," such arrangement to continue until and terminate on the 23d day of August, 1921, when the child would become fourteen years of age. That agreement was by counsel presented to the referee for his approval, which was formally given, and in his report in plaintiff's favor he reported it with his approval to the court. On December 27, 1913, interlocutory judgment was granted and entered, which in all respects confirmed the referee's report; and after the expiration of the statutory period of three months final decree of divorce of the plaintiff from the defendant, in usual form, was made and entered March 28, 1914. That decree recited that the referee's report had been confirmed, but made no other or direct provision as to alimony, and as to the custody of the child provided "that the plaintiff shall have the custody of Josephine, the infant child of the parties, but that the defendant shall be permitted to see said infant child at all reasonable times and said child shall be permitted to visit the defendant from time to time." The agreement had provided that the provision in the decree in regard to the custody of the child, should be "interpreted by the parties and be subject in all things to the following provisions" therein mentioned. The decree also contained the usual prohibition of the defendant, as the guilty party, from remarrying.

On March 30, 1914, only two days after the entry of the final decree, defendant married, at Cincinnati, another woman, about thirty years of age, who was not a co-respondent in the action but was and is of most estimable character and family, and two children, boys, have been born to them.

On June 23, 1914, the plaintiff married Paul R. Clark, a bachelor whom she had known from her childhood. He was a practicing lawyer in Auburn and the attorney of her father.

The defendant made all the payments required by the

agreement of December 4, 1913, until October, 1914, when he set up the claim that, as the plaintiff had remarried, she should thenceforth be supported by her present husband, and that he, the defendant, should be required only to make such part of the said monthly payments of \$500 each as might be required for the support of the child alone, and upon that theory he defaulted in that payment for October, 1914. Thereupon she, on October 25, 1914, began an action to recover it, and he, on November seventh following, began an action in this court against her and her present husband to charge them, as trustees, with the funds paid by the defendant for the benefit of the child, and to have them account therefor with the incidental expectation of thereby eliciting sufficient facts to warrant an application to the court to modify the divorce decree both as to the future payments and as to the custody of the child. No complaint in the action, however, was actually served or apparently even prepared. After a time, upon representations made by plaintiff's counsel that she was providing the child with a governess and with private instruction at her home, the defendant discontinued that action about the end of September, 1915. He made all the payments under the agreement due prior to the commencement of this proceeding. In connection with the discontinuance of such action, the defendant, in a letter written by him to his own counsel and by the latter communicated to plaintiff's counsel, said, in effect, that as long as plaintiff continued to provide for the child as she then was doing, he was willing that she should use as she pleased any surplus of the monthly payments of \$500 each. Shortly, however, the plaintiff dismissed the governess and ceased the private instruction and began to send the child to a public school in Auburn. At first the defendant approved the sending her to that school, but later he objected to it and insisted strenuously that plaintiff should provide a governess and a private teacher. Plaintiff refused to accede to either demand, claiming that as she had no other child she herself was perfectly able to care for the child in all respects, and that it was very difficult in Auburn to obtain a suitable private teacher, and that anyway, in her judgment at least, it was better for the child, at her age and until she reaches

App. Div.]

Second Department, May, 1917.

the age of fourteen, the limit of the said agreement, to attend the public school, which the children even of the best people of Auburn did attend. The controversy thus joined between the parties led to the institution of this proceeding on January 31, 1916.

At the coming on at Special Term of the motion herein for modification of the decree, the justice presiding filed a memorandum stating that he felt himself unable to decide the matter upon the voluminous affidavits and papers submitted, and that he would for several months be unable himself to take the testimony, and, therefore, that a referee should be appointed to take such testimony and report it with his opinion. Thereupon, February 28, 1916, an order was made at such Special Term appointing such referee. The hearings before the referee began on March 16, 1916, and continued quite constantly until they were concluded on June sixteenth following.

While, doubtless, the inquiry should have been confined by the referee to evidence tending to show changes in the condition of the parties since the entry of the decree, as that should ordinarily be regarded as conclusive of their status at that time, he nevertheless permitted a practically unlimited investigation into the antecedents of the parties and their respective families, going back throughout their lives and bringing to the light of a public record even all the criminations and recriminations of the parties, the one of the other, during the period of their differences, which had culminated in their separation and the final divorce action, all such proceeding being over the repeated but vain objection of the plaintiff's counsel. To my mind such procedure served no purpose or accomplished no result except to greatly prolong the reference—over 2,000 pages in this record—and to incidentally and quite unnecessarily reflect to some extent upon the character of both parties beyond the inferences usually to be drawn from the fact of a divorce. The mass of the evidence so taken, aside from the guilt of the defendant proven in the divorce action, certainly did not tend to establish that as to moral and intellectual fitness, or in parental affection, either party in comparison with the other is unworthy to have the custody of such a child in whole or in part.

On July 15, 1916, the referee made his report recommending, in substance, that the custody of the child should be given to the father, and that the mother should have merely the right to see the child "at all reasonable times" and to have the child visit her for two weeks during each month of the summer vacation, and also one week at Christmas and one week at Easter, "but accompanied by a companion or governess." The order appealed from confirmed the report of the referee practically, except the provision as to the child being accompanied by a companion or governess upon and during her visits to her mother. It gave the custody to the father with simply the said right of visitation to the mother.

A reading of the long report of the referee impresses one with the idea that the controlling consideration with him was that the father, by means of his much greater wealth, his far more pretentious homes in New York city and at Greenwich, Conn., and especially through the better educational and social advantages open to a person of means in that city than in Auburn, can give to the daughter a better station in life than the mother.

From the foregoing review of the leading undisputed facts, it is apparent that the provision in the decree as to the custody of the child was, when so made, entirely correct, although it was made by the agreement of the parties approved by the court and is to be construed in the light of that agreement. It was substantially what the court in all reasonable probability would then have made had that particular matter been contested before it. In that event the only alteration at all likely would have been that in view of the gross character of defendant's guilt as proven in the action—which demonstrated that at least during the latter part of the period of his separation from his wife he had lived in open defiance of even the ordinary proprieties, in that he had repeatedly, at his own apartments, apparently without even pretense of concealment, cohabited with abandoned women, not merely one, but at least two at different times—the court might well have very substantially restricted and lessened his share in that custody. Happily, his speedy marriage to an estimable woman and his subsequent exemplary life with her may now be regarded as having very largely removed or mitigated that

App. Div.]

Second Department, May, 1917.

disparagement. It may be noted that I have thus considered the evidence upon which the divorce was granted, although the referee herein excluded it. Against the objection of plaintiff's counsel, he received a flood of evidence showing not only the life of the parties together as husband and wife, but also their antecedents and actions, of almost any and every nature, upon the theory that anything of the sort might have a bearing upon the problem of their comparative fitness for such custody. Upon that theory it would seem manifest beyond all sort of cavil that no evidence could be more competent or material than that establishing defendant's guilt in the divorce action and showing its character as gross and continued and not casual, temporary and exceptional. The referee, upon his own theory of the trial, clearly erred in excluding that evidence, and as it appears in the record as an exhibit marked for identification, I have felt at liberty thus to refer to it.

The conclusion that upon the then merits the final decree was right as to the custody, or at least gave the defendant no cause for just complaint, is especially pertinent because of the basic contention of counsel for respondent that, as the provision in the decree relating to custody was really the result of the agreement of the parties and not of an independent determination by the court, that provision should not here, upon this inquiry, be accorded its usual weight. My such conclusion is based upon the following considerations, viz.:

(a) The defendant was the guilty party. It is well settled that in general the custody of the children of such parties, especially of the only child, will be given, not to the guilty one, but to the innocent.

(b) The mother, the innocent party, was personally worthy and, especially with the provision made by such agreement for her and for the support of herself and child, was amply able financially to care for the child properly in all respects. The provision under the agreement, which was approved by the referee and in effect by the court, gave to her for herself practically outright the sum of \$51,500, payable at once or through promissory notes secured by good indorsement, then at once delivered. In addition, she was by that provision

secured a sum of \$500 a month for the support of herself and the child, which by itself was ample for both purposes. Besides, she possessed some substantial fortune of her own, about \$15,000, which apparently had not come to her from the defendant.

(c) The child was a girl only about seven years of age, and so especially needing the care of the mother.

(d) Through all the period of the two years' separation of the parties, the child had lived with the mother and she had had its general custody.

Under those circumstances, to have taken the general custody of the child from the mother, the plaintiff, and have awarded it to the father, the defendant, with only the right of occasional visitation reserved to the mother, would have been a thing unprecedented and to any well-balanced and unimpassioned mind intolerable. The order appealed from now undertakes to do that very thing. If it can be sustained, it must be simply because there has been in the situation of the parties, since the entry of the final decree, some very decided and substantial change or changes which warrant the transfer of the general custody of the child, who is still only in her tenth year, from the mother to the father. As to any such change, the evidence suggests only three of any possible substantial weight, namely:

(1) The subsequent speedy marriage of each party with another person and the consequent assumption by each of new obligations and attachments.

(2) The material increase in the defendant's wealth.

(3) The refusal of the plaintiff to heed the demands, or at least suggestions, of the defendant as to the method of the care and education of the child.

Apparently both parties recognize that the child has not even yet reached an age where her own inclinations or preferences, if any, as between her parents, should be ascertained or even considered. I do not see that any effort in that direction was made by the referee.

As to the first such element or factor in the problem, namely, the subsequent marriages, each married so speedily after the entry of the final decree as to indicate that each may, before that event, have intended to take that course.

App. Div.]

Second Department, May, 1917.

The defendant married, not the co-respondent, or rather none of the co-respondents, but a concededly respectable and worthy woman, who has already borne him two sons and with whom he has lived an entirely exemplary life. No doubt the defendant's present wife, with her two children, has made his home much more suitable as a home for his daughter than it would have been had he remained unmarried.

I do not think that the fact that he married again in another State, when the decree forbade him to marry again, should be taken as seriously disparaging his character. Our courts have practically held that such prohibition, existing by our law, is not effective beyond the limits of the State, which is tantamount to holding that such law and such decree in that respect are applicable or effective only within such limits. The law, as thus construed, certainly imposes no penalty or disability for the violation of its prohibition by such marriage without the State, even if the same be technically a violation. A law without any penalty or liability for its violation is, for all practical purposes, no law at all. I think, therefore, that defendant's such marriage has, under the circumstances, not impaired but rather has to some extent increased his fitness to have or share in such custody.

As to the plaintiff's, the mother's, re-marriage, I do not perceive that it has diminished her just claim in that regard. Her present husband appears to be an entirely worthy man. He is a lawyer, practicing in Auburn, and was the attorney of the plaintiff's father, and has been for many years a friend of that family. He has held respectable official positions in that locality—postmaster of the city for many years and an assistant district attorney, and in his earlier life as secretary to the late distinguished Congressman Sereno E. Payne and later as his law partner. The learned counsel for the defendant saw fit, upon his cross-examination, to force him to admit that he had never argued a case in the Court of Appeals or the Appellate Division, except a single case in the former, and had rather rarely tried cases in the Supreme Court, and that counsel in his brief appears to contend that those facts indicate the comparative worthlessness of the man. From our own experience we know well that many excellent lawyers rarely, if ever, appear personally in court and yet do much

business and bear good professional reputations with the bar and people generally.

The defendant and his counsel seem to think that the defendant some way had the right to expect that the plaintiff would never marry again and would, at least for the term of the agreement, devote her entire life to the care and nurture of the child. I cannot see that he had any right to indulge in any such anticipation, even if the plaintiff at the time of the making of the agreement so declared her intention. Quite possibly she may then have thought that her matrimonial experience already had was sufficient for a lifetime. However, considering her age, her continuing throughout life unmarried would be unnatural and perhaps against a sound and reasonable public policy.

The apprehensions of defendant and his counsel, approved evidently by the referee, that the affections of the child, if she remain in the plaintiff's home, are very likely to be alienated from the father, to her material prejudice, by reason of the hostility to him of the people there, namely, the plaintiff, her mother, brothers and present husband, do not appear to me to be well founded. No doubt their feelings are really unfriendly towards the defendant, as from their point of view they cannot well fail to be. That situation is one of the inevitable consequences of a divorce secured upon real grounds, as this appears to have been; and with the utmost care some appreciation of such sentiments must come to such a child with her advancing years, and especially as a result of this controversy and of the protracted reference, of which, in the very nature of things, she must know something. It is, of course, and will be the imperative duty of each party, while having the custody of the child, to very rigidly abstain from any unfavorable comment in reference to the other, and very likely that end may best be secured by refraining as far as possible from any comment whatever about the other. I perceive in the record only one fragment of evidence of any breach of such obligation upon plaintiff's part or upon that of her people, and that consists in the fact that when one of the nurses in the mother's present home said to the child, upon one occasion, that she should do what her father had told her to do, the mother said to the nurse, apparently in

App. Div.]

Second Department, May, 1917.

the presence of the child, that she should not bring his name up in that way as she was bringing up the child. That incident, however, was in January, 1912, during the separation, and long before the agreement or the divorce. Considering the controversies which have prevailed between the parties so much of the time since the divorce, and this long and trying proceeding, with its evident stimulus to ill-feeling, it is perhaps remarkable that the mother has transgressed so slightly in that respect. Still, both parties for the future should be held to a strict observance of their duty in that regard as above defined.

It is perhaps too much to expect that, under the circumstances, either party will be entirely fair and sensible in judging of the present conduct of the other. A striking illustration of this is presented by the father's apparent complaint against the mother for teaching or at least permitting the child in the mother's home to call her present husband "Uncle Paul," while it appears that in his home the child uniformly calls his present wife "Aunt Janie," with his entire approval and even direction. The practice in each case evidently has the same merit or demerit, and probably would be considered by most people to be entirely proper and possibly to constitute a happy solution of an embarrassing social problem.

In short, I do not think that the subsequent marriage of either party has substantially affected the merits of the care and custody of the child. While it is true that such marriage of the father and his subsequent family life have in that regard improved his situation, I cannot conclude that such improvement has been at all sufficient to overcome the superiority of the mother's claims or merits as they stood at the time of the decree as above recited.

As to the increase in the father's pecuniary means, it appears that his income has been substantially enlarged until it now amounts to the sum of \$60,000 a year, which, however, is an increase of only about \$10,000 since the making of the agreement. I do not perceive in the record any justification for the claim, apparently made by his counsel, that he is now or is likely ever to be of large fortune, at least not according to the ideas now prevalent in this community. His such income consists very largely of the earnings of his personal services, and in the very nature of things would cease with

his death or disability, or very shortly thereafter. With the expenses of maintaining a home in New York city with six servants, and another upon a large farm at Greenwich, Conn., both evidently expensive establishments, and with his considerable expenditures for life insurance to provide for this child and various of his relatives, in which direction he has been and is being most liberal, and with the large sum paid and to be paid to the plaintiff under the said agreement, it does not appear that out of even so large an income very much can remain for annual accumulation.

However, even if his wealth was very large or likely soon to become such, so that he could afford to provide his daughter with expensive aids to education, artistic as well as substantial, and to social opportunities much beyond what the mother's environment in the comparatively small locality of Auburn can furnish, I cannot feel that the situation and those attendant advantages can, at the child's age, compensate her for the loss of the mother's care and companionship, or of so much thereof as the order appealed from necessitates. If the father were really so very wealthy, that fact might afford ground for the court to increase the allowance to be made by him to the mother for the support of the child, so that she might be reared in harmony with her father's station in life. At present, as the evidence really shows his pecuniary condition, it would appear that the monthly allowance of \$500 is ample for the support and education of the child in any event. In addition to making the payments for that purpose required by the agreement, the father has from time to time, principally at her visits with him, made to her expensive presents, at a cost of several thousand dollars, consisting largely of fine clothing. Indeed, the evidence serves to arouse a substantial suspicion that the plaintiff, mindful of his disposition in that regard and with some exercise of worldly wisdom, has, in sending the daughter to him for her visits, failed to array her in her best clothing, perhaps in the expectation that his generosity in that respect would supply all deficiencies, real or apparent. Such expectation, if entertained by her, has certainly not been disappointed. It would seem, however, that the monthly payments of \$500 will be sufficient for the child for all purposes.

The mother, having married again, is now under no necessity to apply any part of that allowance to her own support, although originally it was designed for the support of both the mother and the child. The evidence does indicate that she has been somewhat parsimonious in her expenditures solely for the benefit of the child—that, indeed, those have amounted to only about \$600 a year, or perhaps even less, out of the \$6,000, the aggregate of the \$500 a month payments. In the accounting which the referee required her to make, she charged against the child a proportionate part of the up-keep of the home. It may be better, however, in the future, for her to charge the child a certain sum per week or month to cover the cost of her general maintenance, although the practice so followed is by no means exceptional and warrants no such condemnation as it received from the referee.

In this connection it may be well to notice an argument which appears to have had great weight with the referee, viz., the contention that the father is somehow a very great man and, therefore, so superior to his former wife that the association of the child with him rather than with her will greatly and much more advantage the child in her education and general development. While it is apparent that the father's professional career has been very creditable, yet I do not perceive that he merits so extreme a eulogium in comparison with the mother. He was the son of country people, entirely respectable but of small means. Largely by his personal efforts in teaching school and otherwise, he acquired a substantial, liberal education, and was admitted to the bar. He married a young woman of the general neighborhood, the daughter of a similar country family although of perhaps better pecuniary circumstances, and came to New York city and there undertook the practice of his profession. He specialized in corporation practice, secured a valuable client therein and so attained in some sixteen years to his present position in the metropolitan district. Such advancement, while notable, is not by any means unique. There are others in the same class. Indeed it is sometimes said, probably with some warrant, that many of the leading lawyers of that district come from the country and progress through somewhat similar careers. In such a career and position I can see no warrant for the belief that

the personal association of the father with his child, a daughter of such age, will promote her mental and moral development more than the like association with the mother, even if, as very often and perhaps usually happens in such cases, she did not during the married life advance in mental strength and worldly experience as much as he did.

As to the third element of change above stated, namely, plaintiff's refusal to heed defendant's requests and suggestions as to the manner of the education of the child, I think that in the main those were reasonable and that the plaintiff should have complied with them. Indeed, to my mind this topic constitutes the only real subject of consideration which this proceeding has ever presented. The child now is nearly ten years of age, and of course the question of her education has become an active and very important one. It is quite likely that the father's larger experience in life and consequent wider field of view make his judgment in that regard better than that of the mother. At least it is valuable and entitled to respectful consideration. For some time before this proceeding was commenced, his insistence was that the child for her general education be sent to some suitable private school for girls, or have private tutoring in the mother's home. Although for a while the mother undertook to comply with his such views, she had for some time, upon various grounds, refused absolutely and with rather scant grace to do so, and had sent and still insists upon sending the child to a public, common school in Auburn. With a patience which would have been most exemplary if the matter had been of any real importance, the referee took a perfect flood of testimony as to the character of that school. In his report he exhibits great concern over the fact, shown by the evidence, that the children of all classes in Auburn, the rich, the poor, the laborers and even a few of the colored people, attend the school. Representatives of various of the best families of the town testified, in plaintiff's behalf, in most loyal defense and high appreciation of the school. Very likely it is a model institution of the kind. But I do not think that we are called upon to adjudicate its merits or demerits. The plain situation is that it is utterly impracticable for this child to attend any school, public or private, and be absent therefrom anything

App. Div.]

Second Department, May, 1917.

like one week in every four upon visits to her father at a distant place. This is to my mind a self-evident proposition. Certainly no one who has ever taught school, as I chance to have done, can fail to recognize its absolute, conclusive character. It is manifest that even the mother herself appreciates it. The mother obtained from the father his consent to the liberal provision made for her at once, and for the future support of herself and the child, upon her consent that he should have such visits from the child at his home, and she at least should not insist upon any system of education which will render those visits impossible. With those visits maintained substantially as they have now been restored by this court pending the determination of this appeal, the only practical system of education for the child in the mother's home is by private tutoring. No class of several in any school, public or private, can be conducted at all successfully with one pupil absent one week out of every four, or two out of every eight. The decree, construed in the light of the agreement, as it should be, gave to the father the right to those monthly visits, and I perceive no just ground for taking from him the substance of that right so long as he is able and willing to pay the increased cost of the child's education necessitated by those visits. If the child may receive her education by private instruction in her mother's home, at least until she reaches the age of fourteen years, the term of the said agreement, the interruption of her education by such visits with her father will be of the least possible harm, and this seems true especially in view of the precociousness of the child, which despite the disturbances to which the differences of her parents have subjected her, has now placed her, in educational status, a year in advance of children generally of her age. It is evident that the mutual affection between the father and the child is very ardent, and that, with all his faults, he is manifestly of strong mentality, and that his considerable personal association with the child is quite likely to be of great value to her. Therefore, I think that, all things considered, it will be better to continue such frequent visitation, although ordinarily I would be very reluctant to advise or approve such a course. I think, however, that it will be better to provide, for the future, that those visits shall be for two weeks at the

end of each two months during the ordinary school year period, instead of for one week each month. That will afford her a continuous term of six weeks for study with her tutor or tutoress and diminish substantially the harm of such frequent interruption of her course of instruction.

The leaving of the matter of such visitations so indefinite as the phrase in the agreement, viz., "consideration being given to the child's health and the possibility of interference with her education," would inevitably result in further misunderstanding and controversy between the parties, which could not fail to be disadvantageous to the child. Therefore, whatever right of custody be granted to the father, he should have definitely and absolutely, and the order in that respect should be precise.

The fact that the mother has been unreasonable in refusing the father's such reasonable requests as to the education of the child does not, in my opinion, warrant the practical turning of the decree around so as to make it award the general custody to the father and the right of visitation merely to the mother. Perhaps, after all, the father's present insistence that he shall have the general custody is at least quite as unreasonable as her such refusal.

The referee closed his report with a wise or at least worldly wise admonition to the mother that she ought to sacrifice her feelings and forego her happiness in the care and nurture of her only child, although still of somewhat tender years, in order that the father's affection for the child may not wane, and that the child in her father's present family may have the advantage of his greater wealth and position in securing for her better facilities in the way of education (general) and in music, art and dancing, and in opportunities for social advancement. The philosophy of this teaching, if carried to its logical consequence, would justify the State in taking away from parents of little means a precocious and promising child and giving it to others who, by means of their greater wealth, could give it greater such material advantages. That philosophy has never yet been accepted in this country and I think is not likely to be. That admonition, being interpreted, meant, doubtless, that the mother should accept the determination of the referee. This appeal, however, indi-

App. Div.]

Second Department, May, 1917.

cates that she has rejected it, as quite naturally she might do. It seems to me that the admonition was unwarranted by the merits and in plain excess of the proper function of the referee in that respect, which was limited to advising the court.

In the solution of this problem of custody, the interests of the child must be the paramount consideration. There has been much judicial writing to this effect, and indeed some of such opinions cited by the learned counsel for the respondent in his brief appear to go so far as to declare that to be the exclusive consideration. In this latter view I do not agree, as I maintain that the natural right of the parent, certainly where it has not been forfeited by gross misconduct, is also an important factor in the determination of the question, and it may be, perhaps, that the interests of the child in a broad sense embrace the due observance of such right.

It is my conviction that the interests of the child here will be best promoted by modifying the decree only to the extent hereinbefore approved. Therefore, I advise that the order appealed from be modified so as to provide:

(a) That the plaintiff, the mother, shall have the care and custody of the child, except that the child shall visit with the father the last two weeks in each period of two months from October to May inclusive, and the last two weeks of each month from June to September inclusive.

(b) That, in addition to the monthly payments provided for in the agreement of December 4, 1913, the defendant shall defray all the expenses of the child's such visits, including transportation to and from plaintiff's home.

(c) That the plaintiff, out of the said monthly payments, shall, beginning with October first next, provide the child with private instruction at her home by a private tutor or tutoress, and that the child shall not attend the public school after the present current term. Such a tutor or tutoress may readily be obtained from outside of Auburn, if not from within.

(d) That this arrangement as to custody, visitation and instruction shall continue until the 23d day of August, 1921, when the child will be fourteen years of age, and that then either party may apply to the court for further provision as to the same. .

I also advise that the order, as so modified, be affirmed, without costs.

JENKS, P. J., STAPLETON, PUTNAM and BLACKMAR, JJ., concurred.

Order modified in accordance with opinion, and as so modified affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CLARENCE LAWSON, Appellant.

Second Department, May 18, 1917.

Crime — robbery in first degree — evidence.

Prosecution of a colored man for the crime of robbery in the first degree.

Evidence examined, and *held*, that the interests of justice require a reversal of the verdict of conviction and a new trial.

APPEAL by the defendant, Clarence Lawson, from a judgment of the County Court of Rockland county, rendered against him on the 22d day of October, 1915, convicting him of the crime of robbery in the first degree, and also from an order denying his motion to set aside the verdict and for a new trial, and in arrest of judgment.

Benjamin Levison, for the appellant.

Thomas Gagan, District Attorney, for the respondent.

Walter E. Warner, for Colored Men's Branch Y. M. C. A., as *amicus curiæ*.

PUTNAM, J.:

The evidence for this prosecution, including the weakness of the testimony of the complaining witness, Burgess, who had been five times arrested as helplessly drunk, and had twice before made charges that he had been robbed, requires us to scrutinize this trial. Having brought out that the appellant, a colored man, had been seen with one Hamilton (who was indicted as an accomplice, but had not been appre-

hended) before this robbery, the learned district attorney asked one Kipple as to meeting Hamilton three or four days after this robbery: "Q. Did Phillip Hamilton on that railroad train at that time in conversation with you describe to you how he and Clarence Lawson [this appellant] held up and robbed Birges and divided the money?" Exclusion by the court followed, but the sinister effect had been produced. It is contended that this was proving the declarations of a co-conspirator, where the confession of one jointly committing a crime may be received against the other. But such admissions are inadmissible after the conspiracy has come to an end. (*Logan v. United States*, 144 U. S. 263, 309.)

The cross-examination of this colored boy made him characterize the adverse witnesses as "falsifying." Applying this to Miss Schuh, led to a question appealing to color prejudice: "Q. You are not even in her station of life, you are of a different color. There is no reason that she would falsify? A. No."

The interests of justice require a reversal and a new trial.

JENKS, P. J., THOMAS, MILLS and RICH, JJ., concurred.

Judgment of conviction of the County Court of Rockland county reversed and new trial ordered.

BROOKLYN BANK IN THE CITY OF NEW YORK, Respondent,
v. METROPOLITAN TRUST COMPANY OF THE CITY OF NEW
YORK, as Administrator, etc., of ALEXANDER McDONALD,
Deceased, and EDMUND K. STALLO, Appellants, Impleaded
with THE ALABAMA SECURITIES COMPANY and WILLIAM
D. STRATTON, Defendant.

Second Department, May 18, 1917.

Principal and agent — authority under power of attorney to guarantee payment of notes — indorsement binding on principal.

Where an attorney in fact, authorized to guarantee the payment of promissory notes, obligations and debts of any company in which his principal may be or become a stockholder, indorses a note of a company of which

his principal was a stockholder before delivery to the payee, for the purpose of lending credit thereto, such indorsement amounts in legal effect to a guaranty of payment, conditioned on presentation, dishonor and notice, and is binding on the principal.

Such indorsement has no legal effect beyond that authorized in the power of attorney, *i. e.*, to bind the principal to pay if the maker does not.

Such power of attorney would not authorize an indorsement passing title and shutting off defenses under the Negotiable Instruments Law.

JENKS, P. J., and THOMAS, J., dissented, with opinion.

APPEAL by the defendants, Metropolitan Trust Company of the City of New York, as administrator, and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 29th day of July, 1916, upon the decision of the court after a trial before the court without a jury. And also from two orders entered in said clerk's office on the 28th day of July, 1916, and the 11th day of August, 1916, respectively.

Charles A. Winter, for the appellants.

William Winthrop Taylor, for the respondent.

BLACKMAR, J.:

The indorsement on the note made by Alexander McDonald, now deceased, was made by the defendant "Edmund K. Stallo, His Attorney in fact." The plaintiff read in evidence a power of attorney executed by McDonald, which empowered Stallo "to guarantee the payment of promissory notes, obligations and debts of any company in which I may be or become a stockholder." The note sued on was made by the Alabama Securities Company, in which the evidence showed that McDonald was a stockholder, to the order of the plaintiff. The indorsement was made before delivery to the payee, for the purpose of lending credit thereto, as was found by the court. The attorney was empowered to guarantee the payment of the promissory note. The indorsement was not for the purpose of negotiation, but to give the credit of the indorser to the note, and it had no other effect. It amounted, in legal effect, to a guaranty of payment, conditioned on presentation, dishonor and notice. It was within the scope of the power granted by the power of attorney,

and was such an obligation as has been held to be a guaranty. As Justice FIELD said of a like indorsement in *Brady v. Reynolds* (13 Cal. 31): "The indorsement is not evidence of any title in the parties, or of any transfer thereof; it is of an irregular character, not made in the usual course of business, and is, in fact, nothing more than a guaranty."

The principal authorized the attorney to lend his credit to the note by a form of obligation which required his principal to pay upon default of the maker. The attorney did lend the principal's credit, but in legal effect imposed a condition that he should receive notice of dishonor of the note. The condition so imposed for the benefit of the principal should not be held to vitiate the obligation. In acting under the power of attorney, it was not necessary to use the word "guarantee." An act which had the same legal effect was authorized. The power of attorney would not authorize an indorsement which passed title and shut off defenses under the Negotiable Instruments Law (Consol. Laws, chap. 38; Laws of 1909, chap. 43), but an indorsement like this had no legal effect beyond that authorized in the power of attorney, i. e., to bind the principal to pay if the maker did not. The attorney acted within the power, but not up to its limits.

It does not appear that the appellants were aggrieved by the method of computing interest which the court adopted, and the orders appealed from were properly made.

The judgment is affirmed, with costs, and the orders are affirmed.

STAPLETON and RICH, JJ., concurred; JENKS, P. J., read for reversal, with whom THOMAS, J., concurred.

JENKS, P. J. (dissenting):

I dissent. The writing on the back of the note was "Alexander McDonald By Edmund K. Stallo, His Attorney in fact." The plaintiff relies upon a power of attorney executed by the said McDonald to Stallo that empowered him "to guarantee the payment of promissory notes, obligations and debts of any company in which I may be or become a stockholder." McDonald has been held as an indorser. It is exactly as if Stallo had written, "I hereby indorse this

note Alexander McDonald By Edmund K. Stallo, His Attorney in fact." I think that this power of attorney did not authorize Stallo to make McDonald an indorser. (*Miller v. Gaston*, 2 Hill, 188; *Brown v. Curtiss*, 2 N. Y. 225; *Brewster v. Silence*, 8 id. 207, 214; *Church v. Brown*, 21 id. 315, 323; *Lamourieux v. Hewit*, 5 Wend. 307.) In *Miller v. Gaston* (*supra*) the court, per BRONSON, J., say: "The obligation of a guarantor is usually more onerous than that of an indorser; but that consideration does not give the creditor a right to disregard the contract actually made, and substitute another, though less burdensome one, in its place." This principle applies in this case, because the very object of the guaranty was to afford the highest form of credit to the corporation in which McDonald was interested.

THOMAS, J., concurred.

Judgment and orders affirmed, with costs.

LOUIS VETAULT, Respondent, v. ANNE KENNEDY, Appellant.

Second Department, May 25, 1917.

Principal and agent — liability of wife for labor and materials in improving her land — agency of husband — promise of payment — Statute of Limitations — payments on running account — setoff.

Where, in an action by a landscape gardener for labor and materials furnished to the defendant, it appears that she requested and used the labor and materials and that her husband acted as her agent, the undenied testimony of the plaintiff that the defendant, when asked for payment, answered that "she was cramped at that time, but she would pay me when she could," sufficiently made out a promise of payment.

The rule that the marital relation alone does not empower the husband to involve the wife by his improvements on her land is not applicable in view of the proof of defendant's express ratification and also of her own orders to plaintiff and her acts of superintendence.

Nor was she released from liability by plaintiff's sending bills to the husband. The Statute of Limitations is not a bar because of payments made on the running account.

A credit of a certain amount on a statement to the defendant's husband was a proper setoff in view of the findings of agency.

App. Div.]

Second Department, May, 1917.

APPEAL by the defendant, Anne Kennedy, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 6th day of July, 1916, upon the report of a referee appointed to hear and determine the issues.

John Thomas Smith [*Frank A. Gaynor* with him on the brief], for the appellant.

Harry G. Stephens, for the respondent.

PUTNAM, J.:

Plaintiff, a landscape gardener, worked many years in laying out, cultivating and ornamenting an Easthampton country estate. Beside the labor, plaintiff brought richer soil for gardens, with fertilizer, also delivered and planted privet hedges, shrubs, plants and evergreens. This account, November, 1908, to July, 1914, totaled \$2,316.35, so that, after credits, the referee rendered a report for \$306.90, with interest from July 10, 1914. The title to the estate stood in defendant's name. The learned referee found that she used the labor and materials furnished, and in some transactions the husband, Arthur Kennedy, acted as agent of his wife. The reasonable value of the aggregate claim was proved by plaintiff without objection, also the fact of a demand of payment from the defendant.

On testimony not very conflicting, it has been found that defendant as owner of this family residence, which she personally occupied between 1909 and 1914, requested of plaintiff this labor and materials; also that in these transactions her husband acted as her agent. Plaintiff's testimony (which defendant did not specifically deny), that when asked for payment of the account defendant answered that "she was cramped at that time, but she would pay me when she could," sufficiently made out a promise of payment. Authorities holding that the marital relation alone does not empower the husband to involve the wife by his improvements on her land (See *Snyder v. Sloane*, 65 App. Div. 543) are not in point here, in view of the proof of defendant's express ratification; also of her own orders to plaintiff and her acts of superintendence over the work being done. She was not released by

plaintiff's sending bills to the husband. (*Foster v. Persch*, 68 N. Y. 400.) Because of payments made on this running account, it was not barred by the Statute of Limitations.

Plaintiff's statement of December 31, 1914, had a credit of \$24 for a roller, also for 100 privet plants returned. When the account showing these credits was introduced by defendant, plaintiff objected that defendant's answer had no counter-claim. Apparently because this credit appeared in a statement to defendant's husband, and not to herself, her counsel did not request the referee to find or allow such a credit. However, in view of the findings of agency, we consider it a proper offset, and hence modify the recovery by deducting the \$24, making the principal \$282.90, with interest from July 10, 1914. As, however, this was not insisted on below and has not been specifically raised on appeal, we think plaintiff should recover costs.

The judgment as reduced to \$282.90, with interest from July 10, 1914, is, therefore, affirmed, with costs in both courts.

JENKS, P. J., STAPLETON, MILLS and BLACKMAR, JJ., concurred.

Judgment reduced to \$282.90, with interest from July 10, 1914, and as so reduced affirmed, with costs in both courts.

PHILIP BAKER and MARY BAKER, His Wife, Respondents, v.
ADDISON JOHNSON, Appellant.

Second Department, May 25, 1917.

Waters and watercourses — presumption of title to lands below high-water line — real property — eviction by paramount title — action for breach of warranty — damages.

The title to lands wholly below the high-water line is presumptively in the State.

Where the Legislature has granted lands below the high-water line to a village, which has laid out across the same a street, a person claiming title thereto is evicted and is entitled to damages for breach of a covenant of warranty.

The expense of defending or attempting to uphold letters patent of lands under water, adjacent to lands conveyed by defendant to the plaintiff, cannot be recovered as damages in an action for breach of covenant of warranty.

App. Div.]

Second Department, May, 1917.

• **APPEAL** by the defendant, Addison Johnson, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 10th day of October, 1916, upon the decision of the court, a jury having been waived.

The action is to recover for a breach of defendant's covenants of seizin, quiet enjoyment and warranty, in his deed made May 20, 1902.

Such deed granted lots 6 and 7 as shown upon a map referred to. Although laid out on the map as on the westerly side of Port Chester creek, which was an arm or branch of Byram river in Westchester county, the lots appear to have been lands formerly covered at high tide. They were conveyed to one of the plaintiffs, Philip Baker, or Becker, who, on August 18, 1908, petitioned and obtained a land grant from the State of contiguous lands under water measuring 3,233½ superficial feet.

On May 18, 1912, at the instance of Mrs. Bridget Wenkenbach (whose lands were on the eastern side of this creek), the Attorney-General instituted a suit to cancel this State grant, of which written notice was given to defendant. Judgment having been rendered annulling this grant or patent on March 26, 1914, the Legislature on March 10, 1914, ceded these lots to the village of Port Chester for highway purposes. (Laws of 1914, chap. 23, amdg. Laws of 1911, chap. 518, § 1.) Since then, the lands have been completely filled in and graded, and the village has run a street called Palmer place across the former site of these lots. Plaintiffs, having thus been evicted from the granted lands, by the judgment under review recovered as damages the original consideration paid, with six years' interest, together with plaintiffs' legal expenses incurred in the unsuccessful defense of the proceedings to annul their land grant.

Frederick W. Sherman, for the appellant.

De Witt H. Lyon, for the respondents.

PUTNAM, J.:

The judgment annulling the land grant from the State applied to land adjoining the two lots which defendant had

conveyed with covenants. Under the allegations in that proceeding, of which suit defendant had due notice, it seems clear that the judgment vacating the grant established that the lands conveyed by defendant were not "uplands," but land beyond high-water mark, although then partially filled in. However, the actual physical condition and origin of these lots does not depend wholly on that judgment. It is proved by uncontradicted testimony in the present suit, to the effect that both lots conveyed were wholly below the easterly high-water line of this arm of Byram river. The title to such lands, therefore, was presumptively in the State, and not in defendant or his predecessors. As the Legislature has granted these lands to the village of Port Chester, which has laid out across the property a street known as "Palmer Place," an eviction from the warranted lands by paramount title has been established. Against this actual eviction, the alleged Colonial charter of 1720 cannot avail the appellant.

The expense of defending or attempting to uphold the letters patent of the lands under water (which are not the lots conveyed, but only adjacent thereto), should not have been recovered, as damages for breach of the covenant of warranty. Such a patent, though based on ownership claimed of this upland, was not a part of the conveyed lands, but was obtained by an independent attempt to acquire State lands, which has failed. Plaintiffs' expense in resisting the State's suit to annul and vacate the patent of such adjacent lands, therefore, was not incurred in defending the possession of the lands warranted. Hence such outlays were not properly recoverable under defendant's covenants.

The judgment should, therefore, be reduced to the sum of \$470, the original consideration, with six years' interest and costs in the court below. As thus modified, the judgment should be affirmed, without costs to either party on this appeal.

JENKS, P. J., STAPLETON, MILLS and BLACKMAR, JJ., concurred.

Judgment reduced to \$470, the original consideration, with six years' interest, and costs in the court below; and as thus modified affirmed, without costs to either party on this appeal.

App. Div.]

Third Department, May, 1917.

ANNIE FINKELSTEIN, Appellant, v. WILLIAM M. BARRETT,
as President of THE ADAMS EXPRESS COMPANY, Respondent.

Third Department, May 2, 1917.

Pleading — Justice's Court — proceedings liberally construed — action against express company for loss of goods — allegations on contract and in tort — waiver of tort — election of remedies — surplusage.

If it is doubtful whether an action is brought in tort or on contract, every intendment is in favor of construing the complaint as setting forth a cause of action on contract on the theory that the tort has been waived.

Proceedings in a Justice's Court being informal, are to be liberally construed with a view to substantial justice.

If a defendant is in doubt as to the nature of the cause of action it should appear before the justice and take proper steps to protect its rights.

When the complaint is so uncertain that its exact meaning is not apparent, and it might be held to sound in tort or in contract, the court can compel an election by the plaintiff as to the theory upon which he will proceed.

When a plaintiff serves a verified complaint with the summons in a Justice's Court, and upon the return day appears in court and asks judgment under the provisions of the Code of Civil Procedure permitting judgment to be taken only in an action upon contract, he thereby makes his election.

Where such a complaint alleges that the defendant express company undertook to carry goods for and deliver them to the plaintiff, and that it failed to deliver them as agreed, and further alleges on information and belief that the goods were lost through the negligence of the defendant, the court was justified in determining that the action was upon contract.

The latter allegation as to the negligence of the defendant may be disregarded as surplusage.

APPEAL by the plaintiff, Annie Finkelstein, from a judgment of the County Court of Sullivan county in favor of the defendant, entered in the office of the clerk of said county on the 4th day of August, 1916, reversing a judgment of a Justice's Court in plaintiff's favor.

Joseph I. Stahl, for the appellant.

Nellie Childs Smith, for the respondent.

KELLOGG, P. J.:

In Justice's Court, in an action arising on contract, the plaintiff may serve with the summons a verified complaint,

and if the defendant fails to answer the complaint, he is deemed to have admitted its allegations and the court may enter judgment against him for the amount claimed. (Code Civ. Proc. §§ 2936, 2891.)

The defendant failed to appear upon the return day of the summons (served with a verified complaint), but attacks the judgment upon the ground that the cause of action was not upon contract and, therefore, the judgment was rendered without authority.

The complaint alleged, so far as we are interested in it, that the Adams Express Company was a joint stock association of more than seven members, doing business as a common carrier of goods for hire, and that the defendant was its president, and that on June 20, 1916, at Monticello, plaintiff delivered to the company, in good condition, a package, and it "undertook to carry for hire and deliver the said package to the plaintiff," at an address in New York city, and that the said company "has failed and refused to deliver said goods as agreed, and on information and belief, the said package of goods was lost through the negligence of the said company," and demanded damages.

If it is doubtful whether an action is brought in tort or on contract, every intendment is in favor of construing the complaint as setting forth a cause of action on contract, on the theory that the tort has been waived. (*Barber v. Ellingwood*, No. 2, 137 App. Div. 704, 713.)

Proceedings in Justice's Court are quite informal, and are to be liberally construed with a view to substantial justice.

Apparently the point urged is more technical than substantial. If the defendant was in doubt as to the nature of the cause of action it should have appeared before the justice and taken proper steps to protect its rights. By omitting to do so it stands here upon technical grounds only and unless its substantial rights are prejudiced it cannot succeed. (*Nefel v. Lightstone*, 77 N. Y. 96, 99; *Salisbury v. Howe*, 87 id. 128, 134.)

When a complaint is so uncertain that its exact meaning is not apparent and it might be held to sound in tort or in contract, the court can compel an election by the plaintiff as to the theory upon which he will proceed, but here there was

App. Div.]

Third Department, May, 1917.

an election. When the plaintiff served a verified complaint with the summons and upon the return day appeared in court and asked judgment under a section of the Code which permits judgment to be taken only in an action upon contract, he made his election.

In *Catlin v. Adirondack Co.* (11 Abb. N. C. 377) the Court of Appeals sustains a complaint as one on contract which is similar to the one in this case.

"In an ordinary action against the carrier for loss of or injury to the goods, plaintiff has an election to sue in tort or on contract." (6 Cyc. 513.)

We quote from 5 Ruling Case Law (p. 63, § 702): "The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same; and, when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract. * * * In those jurisdictions where formal distinctions between actions are abolished, their character must be determined by the nature of the grievance, rather than the form of the declaration. Hence when the facts are distinctly stated, the action will be regarded as either in tort or contract; having regard, first, to the character of the remedy; and second, to the most complete and ample redress, which, upon the facts stated, the law can afford."

We conclude that the statement in the complaint that the package was lost through the negligence of the company might be disregarded as surplusage. The allegation that the defendant undertook to carry the goods for and deliver them to the plaintiff and that it had failed to deliver the goods as agreed, justified the court in determining that the action was upon contract.

The judgment should be reversed, with costs, and the judgment of the Justice's Court affirmed, with costs.

All concurred.

Judgment and order reversed, with costs, and judgment of the Justice's Court affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION.

In the Matter of the Claim of CHARLES WHITE for Compensation under the Workmen's Compensation Law, v. JAMES LOADES, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier.

Third Department, May 2, 1917.

Workmen's Compensation Law — hazardous employment — employee injured while placing threshing machine in barn — farm laborers.

A man who is traveling through the country with a threshing machine and stopping from place to place to thresh for farmers for compensation, is not engaged in farming and his employees are not farm laborers.

A day laborer employed in working and moving such a machine injured while putting the machine in a barn, by the wheels striking an obstruction, throwing the wagon tongue against him, was engaged in the operation of a vehicle, a hazardous employment, within the meaning of the Workmen's Compensation Law.

CERTIFICATION by the State Industrial Commission to the Appellate Division, Third Department, of the following question: "Was the said Charles White, the claimant herein, engaged in a hazardous employment within the meaning of the Workmen's Compensation Law at the time he received the personal injuries for which the award was made?"

Bertrand L. Pettigrew [*Walter L. Glenney* with him on the brief], for the employer and insurance carrier.

Robert W. Bonynge, for the Industrial Commission.

KELLOGG, P. J.:

The employer was carrying on the business of operating a steam machine for the threshing of grain and beans. The machine was moved from place to place for custom work. The claimant was a day laborer employed in working and moving said machine. When moving it from one place to another, while putting the separator in the barn, a wheel struck some obstruction, throwing the wagon tongue around, striking the claimant on his right knee, causing his injury. We think the case comes within group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws

App. Div.]

Third Department, May, 1917.

of 1914, chap. 41), the operation of a vehicle. (*Matter of Costello v. Taylor*, 217 N. Y. 179.)

By subdivision 4 of section 3 of the Workmen's Compensation Law, farm laborers and domestics are not within the protection of the act; but a man who is traveling through the country with a machine, and stopping from place to place to thresh out the grain and beans of the farmers for a compensation, is not engaged in farming, and his employees are not farm laborers. He was running a threshing machine, and while that was not declared a hazardous business, the fact that the machine went from place to place like a wagon or vehicle, and upon wheels, brought it within the group stated, and the injury that came to the claimant arose from the operation of a wagon or vehicle — that is while putting it in the barn.

We answer the question in the affirmative — that the claimant was engaged in a hazardous employment at the time he received his injury.

All concurred.

Question certified answered in the affirmative.

In the Matter of the Judicial Settlement of the Account of
MAUDE VAN DENBURGH, as Administratrix with the Will
Annexed of WILLIAM S. DEYOE, Deceased.

WILLIAM M. MARTIN & Co., Respondent; MAUDE VAN
DENBURGH, as Administratrix, etc., Appellant.

Third Department, May 2, 1917.

**Decedent's estate — husband and wife — liability of father for
burial expenses of incompetent daughter living with mother —
evidence — telephone conversations.**

A father is liable for the burial expenses of an incompetent daughter over twenty-one years of age, without property and residing with the mother. A telephone conversation between the father and the mother is admissible to establish the latter's agency in employing an undertaker. It will be assumed from her testimony that in talking over the telephone with her husband, she recognized his voice.

APPEAL by Maude Van Denburgh, as administratrix with the will annexed, from a decree of the Surrogate's Court of the county of Saratoga, entered in the office of said Surrogate's Court on the 5th day of October, 1916, allowing the claim of respondent against the estate.

Jenkins & Barker [*J. H. Barker* of counsel], for the appellant.

M. E. McTygue [*L. B. McKelvey* of counsel], for the respondent.

KELLOGG, P. J.:

The respondent, undertaker, claims compensation for the burial of the daughter of the intestate, who was at the time of her death over twenty-one years of age, an incompetent person and without property. The mother was living apart from the father, and the daughter was living with the mother. Upon the daughter's death, the mother telephoned the father that the daughter had just died. He asked what undertaker she was to have, and she inquired who he wanted and he said to get the claimant. She replied that she would carry out his wishes and he told her he would see the bill paid. She thereupon employed the claimant and it rendered the service. No question is made about the amount of the bill.

It is urged that the conversation over the telephone was incompetent; that the mother was incompetent to testify to the conversation with the father and that no liability was shown. The surrogate considered that there was a moral obligation upon the father to bury the daughter, which well sustained the promise to pay.

In *Cromwell v. Benjamin* (41 Barb. 558) it was held that a father was liable for the support of his adult daughter, who was an invalid without means and unable to support herself. The infirm daughter was residing with the mother who was living apart from her husband.

Alger v. Miller (56 Barb. 227); 2 Kent's Commentaries [14th ed.] *190; 1 Blackstone's Commentaries, 448, and the Code of Criminal Procedure (§ 916) seem to support that ruling.

App. Div.]

Third Department, May, 1917.

The mother's evidence fully establishes the father's liability. From her testimony she was the agent of the father in employing the undertaker, and she was competent to prove the agency. We feel, however, that it is unnecessary to consider more fully the competency of the mother as a witness, as upon the facts shown, aside from her testimony, the father is well charged with the liability. We must assume from her testimony that in talking over the telephone with her husband she recognized his voice. The decree should, therefore, be affirmed, with costs.

Decree unanimously affirmed, with costs.

JOHN MITCHELL, Respondent, v. VILLAGE OF DANDEMORA,
NEW YORK, Appellant.

Third Department, May 2, 1917.

Municipal corporations — liability for damages for personal injuries resulting from snow and ice on sidewalks — rule of liability of larger cities in southern part of State not applicable to small municipalities in northern part of State — evidence.

The rule of liability of large cities in the southern part of the State for damages for injuries resulting from the accumulation of snow and ice on the sidewalks cannot be applied to small municipalities in the northern part of the State during severe winter weather.

In an action against a village situated in the northern part of the State for personal injuries resulting from a fall on a sidewalk, it appeared that said walk was better kept than others in the village, but that hard snow and ice had accumulated during severe winter weather, to a depth of from two to five inches, so that the center of the walk was higher than at the edges. Evidence examined, and *held*, insufficient to establish the negligence of the defendant.

WOODWARD and COCHRANE, JJ., dissented.

APPEAL by the defendant, Village of Dandemora, New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Clinton on the 21st day of October, 1916, upon the verdict of a jury for \$650, and also from an order entered in said clerk's office on the 26th day of October, 1916, denying defendant's motion for a new trial made upon the minutes.

Patrick J. Tierney, for the appellant.

John H. Booth, for the respondent.

KELLOGG, P. J.:

The plaintiff has recovered judgment for an injury received by falling upon a sidewalk covered with snow and ice. The defendant village is situated upon the side of a mountain, and is principally important on account of the State prison and the State hospital for the insane situated there, and the inhabitants are principally employed by the State in one of those institutions. In addition to such employees there are some storekeepers and others, but the people live and thrive on employment by the State. There are about 850 inhabitants; there is a president, two trustees, no street commissioner. The accident occurred March 16, 1916. There are about 14,000 lineal feet of cement sidewalk in the village. The State buildings are north of Cook street, the principal street of the village running east and west. Emmons street runs at right angles with it from the prison to the railroad station, and on a steep grade of about ten per cent. The sidewalks upon Emmons street were built by the State, or the convicts of the State, with cement furnished by the property owners, and the walks were shoveled by inmates of the prison under the direction of a prison official, and were shoveled after every storm. The winter had been a very severe one, with deep snow and much cold weather, and during the month of March to the time of the accident the highest temperature was thirty-nine and the lowest temperature thirteen below zero, with the thermometer at zero much of the time. During eight of the fifteen days of March, twenty-six and three-tenths inches of snow had fallen. On the westerly side of Emmons street the snow had not been removed during the winter, and was about three and one-half to five or six feet upon the sidewalk. Through the center of the street the snow had been shoveled out in the middle, making a channel for the passage of teams, with a bank of snow on either side three or four feet high. The left-hand walk, upon which the accident occurred, had been shoveled after every storm; it was a cement walk, about six feet wide, and was shoveled the width of the walk to the gutter, so that water could run

off. During a snowstorm, or if it took place in the night, before the men could shovel it in the morning, the snow became packed down by travelers, with the result that when the men came to remove the snow with iron shovels, they could not remove it all down to the cement, but there was hard snow and ice accumulated upon the walk to a depth of from two to five inches, which snow and ice had been accumulating during the winter so the center of the walk was higher than at the edges, forming a ridge, the center being two to three inches higher than at the edges of the walk. On some streets in the village the walks were not shoveled at all, and apparently this walk was the best kept walk in the village, as it furnished the principal communication between the State buildings and the railroad.

I think it is a recognized fact, in the northern part of the State, that during the winter a cement sidewalk is safer with the snow upon it than if kept clear of snow. It is also a known fact that it is difficult to prevent a ridge through the center of a cement walk, caused by the snow being packed down by travelers and the difficulty of removing the snow down to the cement. It is also a matter of common experience in the villages and the small cities in the northern part of the State, that many days during the winter pedestrians find it safer to walk in the center of the street than upon the sidewalks to avoid the icy conditions of the walk. Upon Emmons street people at times walk through the center of the street.

This little village did not guarantee the safety of its walks or indemnify the people traveling upon them, and was not responsible for the severity of the winter or the climate. I think the evidence indicates that this street was as well kept as streets in villages of its size in the same general locality. The same rule of liability cannot be applied to a small municipality in the northern part of the State, during the severe winter weather, and to large cities in the southern part of the State. We think that within the rule of *Williams v. City of New York* (214 N. Y. 259) and *Gaffney v. City of New York* (218 id. 225), and the cases cited, that negligence against the plaintiff has not been shown. "The danger arising from the slipperiness of ice or snow lying in the streets,

is one which is familiar to everybody residing in our climate and which everyone is exposed to who has occasion to traverse the streets of cities and villages in the winter season." (*Harrington v. City of Buffalo*, 121 N. Y. 147, 150.) Undoubtedly the walk was more or less dangerous; but the village walks in the northern part of the State are usually more or less dangerous in winter weather. We cannot say, however, that it was "unusual or exceptional; that is to say, different in character from conditions ordinarily and generally brought about by the winter weather prevalent in the given locality." (*Williams Case*, *supra*, 264.) This walk lay towards the sun, and at times the snow would thaw, and upon the upper portion of the walk a glare of ice was formed, and children of a larger and smaller growth, upon sleds, boards, tins and pasteboards, slid down the walk. But the icy condition did not reach the point in question. At this place the snow and ice upon the walk apparently was not formed by running water, but by walking upon the snow in a damp condition, followed by zero weather. If there was an unusual situation on Emmons street, it was caused in the upper part of the street by permitting sliding upon the walk; but it is not apparent that the condition complained of here was caused in that way.

The judgment should, therefore, be reversed as not sustained by the evidence, and a new trial granted, with costs to appellant to abide the event.

All concurred, except WOODWARD and COCHRANE, JJ., who dissented.

Judgment and order reversed on law and facts and new trial granted, with costs to appellant to abide event. The court disapproves of the finding of fact that the defendant was guilty of negligence.

App. Div.]

Third Department, May, 1917.

In the Matter of the Accounting and Settlement of the Accounts of BOYD McDOWELL and Others, as Executors, etc., of ROBERT M. McDOWELL, Deceased.

BOYD McDOWELL and Others, as Executors, Appellants, Respondents; JOHN G. McDOWELL and Others, Respondents, Appellants.

Third Department, May 2, 1917.

Executors and administrators — trusts — presumption that duties of executors and trustees named in will are coexistent — presumption that investments were made in their capacity as trustees — defense of investments on accounting.

Where there is no period of time or event suggested in a will when the duties of executors named therein are to cease and their duties as trustees to begin, it will be assumed that the testator intended that their duties should be coexistent.

Where such persons named both as trustees and executors do an act which they have not the right to do as executors, but which they may do as trustees, it will be presumed that they have acted in the latter capacity, and on an accounting they have the right to defend investments made by them by invoking the discretion given them by the will as trustees, so far as it will reasonably cover their acts.

APPEAL by Boyd McDowell and others, as executors, from an order of the Surrogate's Court of the county of Chemung, entered in the office of said Surrogate's Court on the 22d day of April, 1916, directing that a supplemental citation issue and certain remaindermen be brought into the proceeding, also from a decree of said Surrogate's Court, entered in the office thereof on the 17th day of November, 1916, settling the accounts herein, and also from a subsequent decree of said Surrogate's Court entered in the office thereof on the 2d day of January, 1917, modifying the former decree.

Appeal, by John G. McDowell and others from parts of the decree herein entered in the office of the Surrogate's Court of the county of Chemung on the 2d day of January, 1917.

Baldwin & Allison [E. J. Baldwin and Thomas M. Losie of counsel], for the executors, appellants and respondents.

John F. Murtaugh [Richard H. Thurston of counsel]; *Stanchfield, Lovell, Falck & Sayles*, and *Turner & Henry*, for other appellants and respondents.

KELLOGG, P. J.:

The decrees appealed from, in effect, charge the executors with \$56,500 on account of reinvestments made in bonds and securities, which have defaulted in paying the interest and with four and one-half per cent interest on such investments during the default. The surrogate has, in substance, determined that the will separated the office of executor and trustee and that the work of the executors must be finished before their duties as trustees began; that the executors remained such until they accounted, and as such had no right to sell securities and reinvest the proceeds; that they had not acted and could not act as trustees and, therefore, that the discretionary power as to investments given to the trustees by the will was unavailing.

The will was probated July 8, 1909, and thereupon letters testamentary issued. The first item of the will directed the executors to pay the debts and funeral expenses; the second item bequeathed certain legacies aggregating \$13,000; the third item gave all the rest of the estate, real and personal, to Casper G. Decker, Jervis Langdon and Boyd McDowell, in trust, to hold, manage, invest and reinvest "as they shall deem wise and judicious and for the best interests of the beneficiaries hereinafter named, said trustees being to that end hereby empowered to sell, grant, exchange, lease, hold or otherwise dispose of the same or any part thereof, subject to the limitations and provisions hereinafter contained (the avails or property into which the same may in any wise be converted being subject to all the conditions hereof applicable to the original property or fund), and to lease, loan and invest the same as they shall deem discrete, and out of the rents, interests, income and profits thereof" to pay the necessary expenses of the trust, the income of \$10,000 to his sister-in-law during life; the remainder of the income to his son and the son's wife during the lifetime of the son, such sums to be paid in such manner and proportion for each as the trustees deem judicious and necessary. Upon the death of the son, the son's wife was given \$8,000, the remainder to go to the son's legitimate descendants, if any; if not, to certain other persons named. The last item appointed said Decker, Langdon and McDowell executors.

App. Div.]

Third Department, May, 1917.

On the petition of the life beneficiaries the executors were required to account, and they rendered an account as executors and as testamentary trustees. The beneficiaries filed objections to certain items of the account, and the general objection that the account was erroneous in uniting the account of the executors and trustees, as the executors had never completed their executorial duties nor been discharged, and had no right or authority to assume the duties, or invest and disburse the fund as trustees, and that the accounts filed should relate to the accounts of the executors only. The evidence called out by the life tenants and by the executors related generally to the administration of the estate from the date of the probate until the accounting, including the income on all securities and property and the income paid the *cestui que trust*. When the examination of the executors was terminated, the petitioners asked that a supplemental citation issue bringing in the remaindermen, which request was granted and the remaindermen were brought in. The inventory showed a personal estate of \$148,980.49 and real estate of \$15,000. Of the personal estate, upwards of \$10,000 was cash in bank, and upwards of \$12,000 was insurance policies upon the testator's life, which were promptly paid. The total debts amounted to \$90.37, so that the money in the bank and the money realized from the insurance policies were more than sufficient to pay the debts, the funeral expenses and the specific legacies, together with the commissions of the executors. The remainder of the personal estate, as inventoried, was invested in bonds and like securities, of which about \$32,737 represented New York State investments; the balance were bonds and securities of railroad, industrial and other companies outside of the State.

The executors promptly opened a bank account in the name of "Estate of R. M. McDowell," and checks were drawn upon printed blanks in which "Estate of R. M. McDowell" was the drawer, and Boyd McDowell signed his name in a blank left between that name and the word "executor" and one of his associates countersigned them over the word "executor." But one account of moneys received and disbursed was kept. Immediately after qualifying they began to make payments of income to the life beneficiaries, and

continued such payments from time to time when income was received. The debts, funeral expenses and legacies have been paid. Boyd McDowell has anticipated his commissions; the other executors have received none. Some assets of small value, a box of nuggets inventoried at fifty dollars, have not been disposed of. They have treated their duties as executors and trustees as coexistent, and have made no discrimination in their bookkeeping between assets, receipts and payments by them as executors or as trustees.

In order to give the life beneficiaries a larger income, and probably also with the intention of benefiting the remaindermen, they sold most of the securities held by the testator in his lifetime and reinvested the proceeds. The investments were made as permanent investments for the purpose of carrying out the trust provisions of the will, and among them are the securities in default.

There is no period of time or event suggested in the will when their duties as executors are to cease and their duties as trustees to begin. Evidently their duties as trustees began at once as to the real estate. It is reasonable to assume, therefore, that the testator had in mind, just as the executors have had, that the duties were coexistent. If the executors had treated the trust estate as distinct, and had kept separate accounts and claimed commissions in each capacity, it would not be unreasonable for the life beneficiaries and the residuary legatees to contest that claim. (*Matter of Ziegler*, 218 N. Y. 544, 551.) We quote from the opinion at page 551: "That the same person may be entitled to compensation as executor, and also as trustee, in respect to the same estate, or some part thereof, is undoubtedly true, but does not follow in every instance where trust duties are imposed upon an executor. Where, by the terms or true construction of the will, the two functions with their corresponding duties coexist, and run from the death of the testator to the final discharge; interwoven, inseparable and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin, double commissions or compensation in both capacities cannot be properly allowed.' (*Johnson v. Law-*

App. Div.]

Third Department, May, 1917.

rence, 95 N. Y. 154, 159.)" (And see *Matter of Kellogg*, 214 N. Y. 460.)

If they had found large amounts of funds uninvested, they would have violated their duties as trustees if they had failed to invest them. If securities received from the testator were known to be doubtful, it was their duty as trustees to change such investments. An executor "holds not in his own right, but as a trustee, for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution under the will, or if not all bequeathed, under the Statute of Distributions." (*Blood v. Kane*, 130 N. Y. 514, 517.) In this case the exercise of the executorial functions required the payment of the debts, the funeral expenses and the specific legacies; the balance of the property was given outright to the trustees in trust. As to property specifically bequeathed, the executor has but a qualified title, the right to apply it in the discharge of the debts after exhausting the other property applicable thereto, and if he assents to the delivery of the legacy, the legatee has title, subject to be called upon, if it transpires that there is not sufficient other property to pay the debts. "The title of one who takes the entire estate under a will stands on the same footing, and is just as absolute, and he, with the assent of the executor, can recover in his own name a chose in action, or make it available by way of counterclaim. The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors, and when they are paid the trust estate sinks into and is merged with the beneficial interest, and the sole devisee and legatee becomes vested with the legal title of all the testator's estate." (*Blood v. Kane*, *supra*, 517. See, also, 18 Cyc. 238.)

"It is not the law, however, that trustees may not receive any part of the trust estate, consisting of personalty, until the executor has accounted and been directed to pay it over.

* * * And even with respect to the residuary estate, the trustee may enter upon his duties as such even before his accounting and discharge as executor. * * * The trustees were not bound to wait until the final accounting of the executor before investing the money belonging to the trust funds in the manner directed by the testator. Certainly

the investment of such moneys was an act of the trustees, who thereupon held the securities purchased as joint tenants." (*Matter of Kellogg, supra*, 466, 467.)

"Although executors are trustees within the larger meaning of the term, the law recognizes a distinction between an ordinary trustee and an executor. A trustee has possession for custody, and an executor for administration with a necessary incidental power of disposal which a trustee does not have." (11 Ruling Case Law, 21.)

"As a general rule an executor will be deemed to be a trustee whenever a non-administrative discretionary power, such as a power of sale, is given to him, or when the duties implied are active within the meaning of this term as applied to trusts. Where an executor, after the payment of debts, legacies and expenses of administration, continues to hold the estate, he may frequently be considered as in fact holding it as a trustee so as to render him liable for mismanagement in the same manner and to the same extent as a trustee would be liable." (11 Ruling Case Law, 22, 23.)

Here the same persons are trustees and executors, and when they do an act which they have not the right to do as executors, but which they may do as trustees, it will be presumed that they have acted in the latter capacity. The accounting, as conducted, has caused the executors to account for their acts as trustees, but when it comes to the reinvestments it is held they are not trustees but executors only, and thereby they are deprived of the benefit of the provision in the will which gives to the trustees a certain discretion as to the investments they shall make. It seems clear in this case that the accounting parties have the right to defend the investments made by them by invoking the discretion which the will places with the trustees. It is unnecessary to determine the effect which such discretion may have. If the investments made by the executors can be sustained in whole or in part by the discretion given to them as trustees, it would be unjust to deny them that defense.

All the persons beneficially interested are before the court. The accounts filed by the executors are for their proceedings as executors and as trustees, and those accounts have been examined and passed upon, except that the surrogate has

App. Div.]

Third Department, May, 1917.

failed to consider how far the discretion vested in the trustees as to investments protects them from liability on account of the defaulted securities. It is clear that the changes in the investments were made by the trustees as such, and that they may invoke the discretion given them by the will so far as such discretion will reasonably cover their acts. There was, therefore, manifestly a mistrial, which resulted in a great part probably from the claim of the life beneficiaries that the investments were made solely as executors and not as trustees, and the claim by the executors that having made investments as trustees, no inquiry as to such investments could be made upon an accounting by the executors. Each side stood upon untenable grounds, with a resultant mistrial. It was contended upon the argument, and apparently with force, that the executors did not produce the evidence which they could have produced to justify the purchases as acts of discretion, as they understood that that question was not before the court.

The life tenants brought into the settlement the residuary legatees and devisees. We have then before the court every person interested in this estate as beneficiary or in any fiduciary relation. Considering the manner of the trial, justice requires that this settlement be considered a settlement of the accounts as filed, and that the court determine whether the accounts as filed are just and true, and as to the defaulted securities, whether the trustees have faithfully executed the trust and used the discretion lodged in them, in a reasonable manner, or whether they have negligently, improvidently and improperly, without due care and caution, made the investments complained of. It is a sacrifice of substance to form to hold that the accounting was solely as executors and that the investments were made as executors and not as trustees.

It is said the executorial position carries with it title to the personal property to the three persons named as executors and the other provision gives to the same persons the same property. We are not controlled by the particular words or language used; we are dealing with the substance of the will, its intent, which is that the accounting parties in this estate are charged with the duties of paying the debts, the legacies,

the expenses of administration, and holding and distributing the remainder to the beneficiaries.

We conclude, from the spirit and substance of the will, the manner in which the estate has been handled, the manner in which the accounts were filed and the evidence given, all persons having any possible interest being before the court, that it was the duty of the surrogate to determine the controversy without regard to technicalities of form or procedure.

If it is discovered that any parties interested, or who may be interested in the trust estate, are not before the court, the surrogate should bring them in.

The decree and the amended decree should, therefore, be reversed and the matter remitted to the surrogate for further consideration, with the right to either party to introduce such further evidence as may be proper. The order bringing in the residuary legatees and devisees should be affirmed. The cross-appeal from a portion of the decree falls with the decree. Having determined that the decree is a result of a mistrial, neither party is more responsible for such result than the other, and no costs are imposed.

All concurred.

Decree and amended decree reversed and the matter remitted to the surrogate for further consideration, with the right to either party to introduce such further evidence as may be proper. The order bringing in the residuary legatees and devisees affirmed. Cross-appeal by the life beneficiaries dismissed, without costs. This decision is without prejudice to the right of the life beneficiaries to apply to the surrogate for payment of income whenever there is any on hand properly applicable to that purpose.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. MORRIS BLOCK, Assessor of the City of Kingston, Ulster County, New York, Respondent.

THE ULSTER AND DELAWARE RAILROAD COMPANY,
Respondent.

Third Department, May 2, 1917.

Taxes — certiorari — review of assessment of railroad company — right of another company alleged to be under-assessed to intervene — Tax Law construed — Code of Civil Procedure construed.

Where, in a proceeding by a railroad company by certiorari to review its assessment on the ground that it is excessive compared with that of other property on the same roll, another railroad company, the only one upon the roll, is mentioned in the petition as being under-assessed and much of the evidence relates to such assessment and the property of such railroad is being considered item by item, the court may, in its discretion, under section 2137 of the Code of Civil Procedure, permit said company to intervene upon the ground that it is "specially and beneficially interested in upholding the determination to be reviewed."

But every party whose assessment is questioned upon such a proceeding should not be allowed to intervene.

The Code of Civil Procedure does not provide a new remedy of certiorari, but regulates the writ and the practice therein in cases where it is expressly authorized by statute or where the right to it existed at common law and has not been taken away by statute.

The Tax Law, sections 290-296, both inclusive, permitting a review of assessments by certiorari, is exclusive only in so far as it regulates the practice and the use of the writ in tax cases.

COCHRANE, J., dissented.

APPEAL by the relator, The New York Central Railroad Company, from an order of the Supreme Court, made at the Ulster Special Term and entered in the office of the clerk of the county of Ulster on the 25th day of October, 1916, permitting the Ulster and Delaware Railroad Company to intervene in this proceeding.

Amos Van Etten, for the appellant.

A. T. Clearwater and *William D. Brinnier* for the respondents.

KELLOGG, P. J.:

The relator is reviewing by certiorari its assessment, on the ground that it is excessive compared with that of other property on the same roll. Relator has two roads assessed upon the roll, and the Ulster and Delaware railroad is the only other railroad upon the roll, and is mentioned in the petition as one of the parties under-assessed as compared with the relator. Upon the trial, to quite an extent, the issue resolves itself into an attack upon the assessment of the Ulster and Delaware railroad, and much of the evidence relates to that assessment, and the property of the road is being considered item by item, and the course of the examination was such that the said Ulster and Delaware Railroad Company asked to intervene and intervention was granted by the order appealed from, upon certain terms and conditions. The terms and conditions are not complained of here. The appeal proceeds upon the theory that the writ is governed entirely by the Tax Law, and that section 2137 of the Code of Civil Procedure does not apply and that, if it does apply, the intervenor is not shown to be "specially and beneficially interested in upholding the determination to be reviewed" as required by that section.

The Code does not provide a new remedy of certiorari, but regulates the writ and the practice therein in cases where it is expressly authorized by statute, or where the right to it existed at common law and has not been taken away by statute. The provisions of the Code apply to every statutory or common-law writ except in cases where the statute has made provision superseding them. The Tax Law, sections 290 to 296, both inclusive, as amended, permits a review of assessments by certiorari, and gives certain rules governing such procedure. And so far as it regulates the practice and the use of the writ in tax cases, the provisions are exclusive and override the Code provisions. (*Mercantile Nat. Bank v. Mayor, etc.*, 172 N. Y. 35.) Where the statute is silent, the provisions of the Code are effective. (*People ex rel. Rochester Telephone Co. v. Priest*, 181 N. Y. 300.) That case was a review of a special franchise tax, under section 45 of the former Tax Law, which directed that "Such writ must run to and be answered by said State Board of Tax Commis-

sioners and no writ of certiorari to review any assessment of a special franchise shall run to any other board or officer unless otherwise directed by the court or judge granting the writ." The opinion gives some prominence to the provision quoted, but seems to hold that sections 452, 2137 and 2133 of the Code of Civil Procedure, permitting other parties to be brought in, furnishes a rule of practice in these cases. Section 291 of the present Tax Law provides that the writ shall issue to the officers making the assessment; section 2129 of the Code is to the same effect. Section 2133 of the Code of Civil Procedure provides that after the writ has been issued any "other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable." Section 2137 allows a person specially and beneficially interested in upholding the assessment to appeal to the discretion of the court to be made a party to the proceeding. The last section referred to does not relate to the person to whom the writ shall be directed and who shall make the return, but allows the court, in its discretion, to admit a person as a party. The provision of the Tax Law as to how the writ is to be directed, relates only to the issuing of the writ and the making of the return, but is silent upon the question as to whether the court in its discretion may allow an interested party to intervene and take a part in the proceedings.

It follows that the court, in its discretion, has the power, in a tax case, as in other cases of certiorari, to bring in a new party. It is true a determination in this proceeding will not be *res adjudicata* against the respondent company, but it would naturally influence the assessors in their future action and furnish a certain basis of information upon which they may properly act. Assessors do not necessarily act upon legal evidence, but may act upon such information as they have. The respondent company was, therefore, specially and beneficially interested in establishing that its assessment was just. A special circumstance bearing upon the discretion of the court was the manner in which the trial was conducted and the persistency and detail with which the respondent

company's assessment was attacked. It was interested generally with the other taxpayers of the town. No serious harm can follow to the relator, as the order charges the additional expense which may be caused upon the intervenor and, as we say, no complaint is made upon that ground. Here the party brought in may only examine and cross-examine witnesses, and call witnesses and introduce evidence, as permitted by the court. We conclude that the court had the power to make the order and that it was a proper exercise of the discretion of the court upon the facts shown.

Manifestly every party whose assessment is questioned upon such a proceeding should not be allowed to intervene; but the sound discretion of the court will in each case result in such an order as justice requires.

The order should, therefore, be affirmed, with ten dollars costs and printing disbursements.

All concurred, except COCHRANE, J., who dissented on the authority of *People ex rel. Rochester Telephone Co. v. Priest* (181 N. Y. 300).

Order affirmed, with ten dollars costs and disbursements.

CLIFFORD E. VAN BUREN, an Infant, by GEORGE C. VAN BUREN, His Guardian ad Litem, Respondent, v. THE TOWN OF BETHLEHEM, Appellant.

Third Department, May 2, 1917.

Municipal corporations — negligence — liability of town for injury to minor while walking along footpath over sandy bank adjoining highway — evidence of prior accident at same place.

Where in an action against a town for personal injuries, it appears that the plaintiff, a boy about nine years of age, in order to avoid a team approaching through a cut in a sandy country road, went upon a footpath not made or maintained by the town, which was about three feet wide and within twelve to twenty-five inches of the sandy bank forming the cut into the road, and the bank gave way, it was reversible error to allow a witness to testify that at the same place about ten years before the present accident, in the winter time and in the evening, while passing

App. Div.]

Third Department, May, 1917.

over the path, which was covered with snow, ice and slush, she slipped off the bank and broke her shoulder.

From the lapse of time and the difference in the circumstances, such evidence was incompetent to show the dangerous condition of the footpath or notice to the town.

Under the circumstances shown, the town cannot be held to have been negligent.

APPEAL by the defendant, The Town of Bethlehem, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 1st day of September, 1916, upon the verdict of a jury for \$200, and also from an order entered in said clerk's office on the 11th day of September, 1916, denying defendant's motion for a new trial made upon the minutes.

William A. Glenn [*Michael D. Reilly* of counsel], for the appellant.

Frost, Daring & Warner [*Stephen J. Daring* of counsel], for the respondent.

KELLOGG, P. J.:

The McCormick road is about two and one-half miles long and runs from the New Scotland State road to Slingerlands, there again joining that road, and is used principally for the accommodation of the ten or twelve farmers who live upon it. It is two rods wide, unimproved and sandy. At the place where the plaintiff received his injuries, the road runs through a little hill, the banks on either side of it being about four feet higher than the road itself. The road was very sandy through this cut, and running along this road, in different places, were footpaths, used by pedestrians, and at this place a footpath, about three feet wide, was more or less used by people traveling along the road. The path was within twelve to twenty-five inches of the bank forming the cut into the road; the bank was sandy.

The plaintiff, a lad about nine years of age, May 17, 1911, at about six o'clock P. M. was passing over the road with his bicycle and saw a team approaching at the other end of the cut. To avoid it he went upon the footpath, pushing his bicycle at his side, he walking between the bicycle and the

traveled part of the road, when the sandy bank gave way, as he says, and he fell, sustaining an injury. It was proved, over the defendant's objection, that at this place, about ten years before the accident, in the winter time, at about seven-thirty in the evening, a woman, while traveling along this road in the dark, while it was covered with snow, ice and slush, slipped off the bank, fell and broke her shoulder. She says: "Well, I stepped too near the edge and there was false grass there and there was no earth under it and I wasn't aware of that, and fell out." From the lapse of time and the difference in the circumstances this evidence was incompetent to show the dangerous condition of the footpath or notice to the town, and its receipt requires a reversal of the judgment.

The footpath was not made or maintained by the town for travel, but some pedestrians from time to time had traveled there and made more or less of a path of it. The condition of the soil in the neighborhood was naturally sandy and it is evident that if any one came too near the bank it was liable to give way. In this locality, under the circumstances, we do not feel that any negligence has been shown. (*Flansburg v. Town of Elbridge*, 205 N. Y. 423; *Lane v. Town of Hancock*, 142 id. 510; *King v. Village of Fort Ann*, 180 id. 496.)

We do not find in the case sufficient evidence to charge the defendant with negligence. The judgment should, therefore, be reversed, with costs, and the complaint dismissed, with costs.

All concurred.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

DELIA B. FROUDE, Respondent, v. CHARLES R. FLEISCHMANN,
Appellant.

Third Department, May 2, 1917.

Contract — agreement by treasurer of corporation in which his father's estate was interested to take up loan against said corporation and give notes therefor — Statute of Frauds — consideration.

The treasurer of a corporation in which his father's estate was largely interested as a creditor and otherwise, and which was indebted to the plaintiff for moneys loaned, for the enforcement of the payment of which the plaintiff had taken active steps, replied to a letter written to his mother, the executrix of the estate, as follows: "I have taken it upon myself to settle the question * * * I have decided to take up this loan myself on behalf of the estate in shape of five notes," which he agreed to pay with interest. The plaintiff in an action to recover the amounts which would become due on said notes if they had been delivered as proposed, alleged that he discontinued the collection of his claim and canceled and surrendered the same with interest and accepted the offer of the defendant to take the notes, which the defendant refused to deliver. *Held*, that the contract constituted an original agreement, unprejudiced by the Statute of Frauds, given for a sufficient consideration and enforceable.

APPEAL by the defendant, Charles R. Fleischmann, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Delaware on the 31st day of August, 1916, overruling a demurrer to the complaint.

Aronson & Salant [Louis Salant of counsel], for the appellant.

Harry Sammet [Jerome A. Strauss of counsel], for the respondent.

KELLOGG, P. J.:

The defendant was treasurer of the Continental Export Company, in which his father's estate was largely interested as a creditor and otherwise. The export company was indebted to the plaintiff for moneys loaned, as follows: \$1,000, with interest thereon from September 19, 1908, and \$1,000, with interest thereon from December 17, 1908. In January, 1913, the plaintiff was taking active steps to enforce payment of these loans from the company, and the defendant's father's

estate was endeavoring to protect its interest as a creditor and otherwise of the company, and endeavoring to realize as much as possible from its assets. The plaintiff had written the defendant's mother, whom we infer was the executrix of the estate, with reference to some settlement or adjustment of her claim against the export company, and on January 14, 1913, the defendant answered the letter as follows:

"My mother having been far from well for the past few weeks, I have taken it upon myself to settle the question contained in your favor of the 9th inst. addressed to her. As I have explained to you on a number of occasions, the loan in question has nothing whatsoever to do with either the estate of Louis Fleischmann or with myself. However, in order to settle the question once for all and in order not to cause you any further loss, I have decided to take up this loan myself on behalf of the estate in the shape of five notes of \$400 each, one maturing at the end of each of the five next ensuing years. These notes are to bear interest at six per cent, and as each note matures the principal together with the interest will be paid. I have explained to you my own position thoroughly and this is the only manner in which I can or care to take up this matter, which is not at all a personal one but one which I am handling as the representative of the family.

"Please let me know if this is agreeable to you, and if so I shall be pleased to send the necessary papers at once. With kindest regards, I remain,

"Very truly yours,
"CHARLES R. FLEISCHMANN."

The plaintiff alleges that pursuant to the defendant's promise she did forego and discontinue the collection of said claim, and canceled, abandoned and surrendered up the claim of principal and interest against the export company, and accepted the offer of the defendant to take his notes for \$2,000, according to said offer, and that after the plaintiff had made the acceptance, the defendant refused to deliver the notes as agreed, and this action was brought to recover the amounts which would become due on said notes if they had been delivered as proposed.

App. Div.]

Third Department, May, 1917.

The defendant demurs and contends: (1) That the contract contemplated some other instrument and was not complete; (2) that it is void under the Statute of Frauds as not stating a consideration, and (3) that it is the obligation of the estate and not of the defendant. The trial judge, upon the authorities cited by him in his memorandum (*Brauer v. Oceanic Steam Navigation Co.*, 178 N. Y. 339; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 id. 209; *Raubitschek v. Blank*, 80 id. 480) properly concluded that the contract was complete and enforceable.

We do not know what was in the letter written to the mother to which the son wrote the reply. It undoubtedly contains some proposition for the settlement of the plaintiff's claim, or for turning it over to protect the interest of the estate in the property. The letter written by the defendant is to be read in connection with the known circumstances stated in the complaint and admitted by the demurrer. By the proposed agreement the company was relieved from the threatened litigation and from the necessity of immediate payment; the estate of the father was made more secure in its claim and interest in the company, and we may well infer from the language of the letter that the defendant was to take up the loan himself—not necessarily that he was to pay the debt of the export company, but was to take over the debt and hold it in the interest of his father's estate in which he presumably was interested. The consideration of the agreement was that for \$2,000 in the defendant's notes, on time, the plaintiff was to forego her claim against the export company of \$2,000, with interest thereon for several years, and that the father's estate was to be enabled, at its leisure, to protect its interest in and against the company as it saw fit. If the company was responsible, the defendant was making a good profit by taking up the loan; if it was in doubtful circumstances, he was protecting his father's estate, and the surrender of the plaintiff's rights, to which he naturally succeeded, was a good consideration. We conclude, therefore, that the agreement was an original agreement, unprejudiced by the Statute of Frauds. It was not collateral to any other existing obligation, but was a final adjustment of the loans, so far as the plaintiff was concerned. If defendant, in any

form, relieved the company of the obligation to the plaintiff, at its request, he became thereby a creditor of the company. The company ceased to be liable to her and the defendant became the creditor in her place.

When the defendant wrote, "I have taken it upon myself to settle the question * * * and * * * have decided to take up this loan myself on behalf of the estate, in the shape of five notes," he evidently intended, and was understood to mean, that he would give his notes for the amount. We cannot infer that he was offering to give the estate's notes. It is more natural to assume, as stated, that he was to take over these loans and give his own notes for a less amount in place of them. The judgment should, therefore, be affirmed, with costs.

All concurred; SEWELL, J., not sitting.

Interlocutory judgment unanimously affirmed, with costs, with usual leave to defendant to answer on payment of costs in both courts.

MELINDA S. KIDNEY, Respondent, v. LEON A. WAITE and Others, Respondents, Impleaded with GEORGE D. HEWITT and Others, Appellants.

Fourth Department, May 2, 1917.

Decedent's estate — descent of real property — Decedent Estate Law, section 88, construed — evidence insufficient to establish that real property of which intestate died seized came to her on the part of her father.

Section 88 of the Decedent Estate Law, providing for the descent of property, is in derogation of the common law and should be strictly construed.

Heirs of a decedent, upon her father's side, in order to establish exclusive title in themselves under said statute, must show, *first*, that the property claimed by them as and when it came to the intestate, was an "inheritance," i. e., real estate as distinguished from personal property, and *second*, that it came to the intestate "on the part of the father" directly either by "devise," "gift," or "descent."

Evidence examined, and *held*, insufficient to establish that the property of the decedent came to the intestate on the part of her father.

FOOTE, J., dissented.

App. Div.]

Fourth Department, May, 1917.

APPEAL by the defendants, George D. Hewitt and others, from so much of an interlocutory judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Jefferson on the 24th day of July, 1916, as adjudges that the respondents are the owners in fee of the premises described in the complaint.

The judgment was rendered upon the decision of the court after a trial at the St. Lawrence Special Term and decreed the sale of certain real property in partition.

W. B. Van Allen, for the appellants.

G. S. & H. L. Hooker [*H. L. Hooker* of counsel], for the plaintiff, respondent.

P. C. Williams, for the respondents Waite and others.

MERRELL, J.:

This action is in partition, and the sole question involved upon this appeal is as to whether upon the death of the intestate her real property descended to her paternal heirs to the exclusion of her maternal heirs or whether the maternal heirs were entitled to share therein.

Eliza L. Hosford, the intestate, died at the city of Watertown, N. Y., on the 4th day of August, 1915, leaving John C. Hosford, her husband, her surviving, but died without leaving child or descendant, father, mother, brother or sister. She left, however, her surviving, uncles and aunts and descendants of uncles and aunts, both on the side of her father and of her mother. At the time of her decease she was seized in fee simple of the real estate described in the complaint, consisting of residential property in the city of Watertown, N. Y. The property has been sold herein, and the proceeds are in the hands of the county treasurer of Jefferson county awaiting the determination of this appeal.

The respondents, being the heirs of decedent upon her father's side, assert title thereto by reason of the fact which they claim the evidence establishes, that the real property of which the intestate died seized came to her on the part of her father. The appellants deny that the real property came to the intestate through her father, and, therefore, claim

a share in the proceeds of sale. The evidence was taken before a referee and reported to the court without opinion, and thereon the court at Equity Term made its decision whereby it found and decided that said real estate came to the intestate on the part of her father, and thereon interlocutory judgment was granted decreeing title thereto in respondents as the paternal heirs of said intestate. I do not think the evidence justifies such conclusion. The paternal heirs of the intestate base their claim to the real estate in question to the entire exclusion of those upon her mother's side, by virtue of certain provisions of statute. Section 88 of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18) provides as follows:

" § 88. Brothers and sisters of father and mother and their descendants * * *. If there be no heir entitled to take, under either of the preceding sections, the *inheritance*, if it shall have come to the intestate *on the part of the father*, shall descend:

" 1. To the brothers and sisters of the father of the intestate in equal shares, if *all* be living.

" 2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

" 3. If all such brothers and sisters shall have died, to their descendants.

" 4. * * * But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; * * *. If the inheritance has not come to the intestate on the part of *either* father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate. * * *."

Section 80 defines the term "*inheritance*" as used in the Decedent Estate Law, and the effect of the statute relative to such descent. It is provided:

" § 80. Definition and use of terms; effect of article.

App. Div.]

Fourth Department, May, 1917.

" 1. The term 'real property' as used in this article, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. 'Inheritance' means real property as herein defined, descended according to the provisions of this article.

" 2. The expressions 'Where the inheritance shall have come to the intestate on the part of the father' or 'mother,' as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent."

These statutory provisions constitute the only basis for the claim of the respondents to the proceeds of said real estate to the exclusion of the appellants. The statute is in derogation of the common law and requires strict construction. To establish exclusive title in themselves the respondents must show, *first*, that the property claimed by them as and when it came to the intestate was an "inheritance," *i. e.*, real estate as distinguished from personal property, and, *second*, that it came to the intestate "on the part of the father" directly, either by "devise," "gift" or "descent." In other words, the property must have come to the intestate from her father in one of the three ways mentioned. Concededly it could not have come to the intestate by devise, as her father died intestate, and, as her father never had title to the real estate of which she died seized, it could not have come to her by descent, and it is difficult to appreciate how the inheritance could have come to her by gift from her father, when he never had title to it.

It is the contention, nevertheless, of the respondents that the inheritance came to the intestate on the part of her father by gift, and while the trial court has made no express finding of a gift, yet the claim of the respondents seems to be upheld on such theory. Title to the real property in question was prior to August 4, 1868, in one John Prouty, and the same was on said date conveyed by said Prouty and wife to the intestate,

Eliza L. Hosford. It is the claim of the respondents that the consideration for such conveyance was furnished and paid by the father of the intestate, one Perley Blodgett, and that it was by his direction that the deed of conveyance was made to his daughter, Mrs. Hosford, and the learned trial court has found that the evidence establishes such facts, and the conclusion has been reached that the real property of which Mrs. Hosford thus became the grantee was within the terms of the statute mentioned an "inheritance" coming to the intestate on the part of her father, Perley Blodgett, by gift. I am unable to acquiesce in such determination.

Deferring for the present the question whether the facts claimed to have been established are such as show an inheritance coming to the intestate on the part of her father, I am unable to discover any evidence of probative force showing either that the consideration for the conveyance to Mrs. Hosford was paid by her father or that the deed from Prouty to her was pursuant to any direction on the father's part. The learned trial court in its opinion states that the evidence shows that the real property was paid for by the father of the intestate. A careful analysis of the evidence will, I think, refute such claim. In an effort to prove such payment and direction to deed to Mrs. Hosford, the paternal heirs swore but two witnesses, and it is upon their testimony that respondents rely. *First*, the witness John F. Moffett was sworn, and testified to an acquaintance with Perley Blodgett, intestate's father, as early as 1860 or 1861, when the witness was a bank clerk and Blodgett was a customer of the bank. They became friendly and had some business relations and after Blodgett's death the witness was appointed administrator of his estate. Relative to the conveyance of the real property in question to Mrs. Hosford, the witness Moffett, on his direct examination, was interrogated and answered as follows: "Q. Now, Mr. Moffett, do you know by whose direction that deed was made to Mrs. Hosford? * * * A. I think I do. Q. Do you know who paid for the property? * * * A. I think I do. * * * Q. Now, who did furnish the money to pay for this house for which this deed was given? * * * A. Perley Blodgett."

On cross-examination the witness Moffett was asked the

App. Div.]

Fourth Department, May, 1917.

following questions and gave the following answers thereto: "Q. Mr. Moffett, you didn't see this money paid over to Mr. Prouty, did you? A. I can't say that I did. Q. Or in what denomination it was paid over to Mr. Prouty, you don't know? A. No. Q. And when it was paid, you don't know? A. I don't know the exact hour or day. Q. Or date? A. No. Q. Or month? A. I think I know the month. Q. Positively? You were present when the money was paid to Prouty? A. I can't swear that I was. Q. Do you know that you were or were not? Will you say that you were or were not? A. I can't say. Q. You haven't any present recollection of being present? A. No. Q. And who handed the money to Prouty, you don't know? A. No, I can't tell."

The paternal claimants also swore the surviving husband of Eliza L. Hosford and on direct examination he testified as follows: "Q. Who paid for the property? * * * A. Her father."

On cross-examination he testified as follows: "Q. When you say that your wife's father paid for that property you are simply telling us to the best of your judgment? A. Why yes. Q. That is what you think, is it not? A. Yes. Q. Whether your wife's father gave the money to your wife and she paid Prouty or whether it was paid in some other way, you don't know? A. There is no way — Q. You told us that you weren't there when the money was paid over. You have no recollection of being there, that is right, isn't it? A. Yes. Q. You say you have no recollection of being present when the money was paid to Prouty? A. No. Q. So just how it was paid to Prouty, you don't know? A. No."

The foregoing is the entire testimony relied upon to prove the payment by the intestate's father of the consideration for the conveyance to her, and falls far short of establishing such payment or of connecting Blodgett with the transaction. Neither of the witnesses evidenced any actual knowledge of the alleged payment of the purchase price by Blodgett. Whatever impression either witness had appears to be based upon hearsay and to be purely conjectural. Their testimony is devoid of probative force. The burden was upon those claiming the property by virtue of the alleged participation of

intestate's father in the transaction whereby the property was deeded to her, to connect the father. They failed to discharge the burden cast upon them.

But even assuming that the evidence established the fact that Blodgett paid the consideration for the conveyance to his daughter, I am still of the opinion that even upon that assumption the statutory requirements have not been met. If Blodgett gave his daughter the money to pay for the premises such gift was of personal property and never was an inheritance, nor was it real property. If Blodgett paid Prouty directly and Prouty thereupon deeded to the daughter the real estate came from Prouty and never passed through her father. As defined by the statute the inheritance did not come to the intestate on the part of her father. He never owned such inheritance or the real property which it represented, and hence it could not have come to the intestate on his part. (*Champlin v. Baldwin*, 1 Paige, 562; *Adams v. Anderson*, 23 Misc. Rep. 705.)

The learned trial court based its decision upon the case of *Dolin v. Leonard* (144 Ind. 410). We think that case clearly distinguishable from the case at bar. There intestate's father held a contract for certain real estate. He paid the consideration and was entitled to a deed of the premises. He had taken possession of the property, fenced the same and built his dwelling thereon. Later he caused the deed to be made to his daughter, the consideration being love and affection. The daughter died and the court held that the equitable title was in the father, he having paid the purchase price and been in possession under his contract and having made valuable improvements. Such was not the case here. Blodgett never was in possession and never held the equitable title to the premises. He never had the slightest interest therein. Moreover, the decision in *Dolin v. Leonard* has the support of the Indiana statute,* providing as follows: "An estate which shall have come to the intestate by gift or by conveyance in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living, at the intestate's death."

* See Indiana Revised Statutes (1881), § 2473; Indiana Revised Statutes (1914), § 2997; 2 Burns' Anno. Ind. Stat. (1914) 116, § 2997.—[RER.]

App. Div.]

Fourth Department, May, 1917.

No such statute affects the situation before us. We do not regard the Indiana decision as an authority in support of the decision here.

The interlocutory judgment, insofar as it adjudges ownership in fee of the real property in question in the paternal heirs of the intestate should be reversed and in its place judgment should be directed providing for distribution of the proceeds of sale of said real property among both the paternal and the maternal heirs of said intestate, with costs to the appellants.

All concurred, except FOOTE, J., who dissented and voted for affirmance.

Interlocutory judgment, in so far as it adjudges ownership in fee of the real property in question in the paternal heirs of the intestate, reversed upon questions of law and fact, and in its place judgment directed providing for distribution of the proceeds of sale of said real property among both the paternal and the maternal heirs of the intestate, with costs to the appellants. The finding of fact in the decision, numbered 10, is hereby disapproved and stricken out, and conclusions of law amended to conform with this decision.

HAAS TOBACCO COMPANY, Respondent, v. AMERICAN FIDELITY COMPANY, Appellant.

Fourth Department, May 9, 1917.

Insurance — indemnity against liability for injuries caused by automobile — policy construed — requirement that assured notify insurer of accident — delay in giving notice.

Where a policy indemnifying the owner of an automobile against liability for accidents requires the assured to give immediate written notice to the insurer upon the occurrence of an accident with the fullest information obtainable and further requires him to give like evidence with full particulars if a claim is made on account of such accident, it is necessary for the assured to give notice in each case of accident in order to preserve the benefit of the policy, although, the accident being slight, he had no immediate reason to suppose that a claim would be made against him by the person injured.

Thus, there can be no recovery on such policy where no notice of an accident was given to the insurer until ten days had elapsed and when an action was brought against the assured.

APPEAL by the defendant, American Fidelity Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 22d day of June, 1916, upon the verdict of a jury.

Charles Newton, for the appellant.

A. F. Chapin, for the respondent.

LAMBERT, J.:

This action is upon an insurance policy by which the defendant agreed to indemnify the plaintiff against liability for accident.

Judgment has heretofore been recovered against plaintiff by the person injured. That judgment has been affirmed in the Appellate Division and paid by the plaintiff. And this action seeks reimbursement for such payment.

The scope and application of the insurance policy and the facts involved are not questioned except in a single particular. By the policy it is provided: "Condition 3. Upon the occurrence of an accident the insured shall give immediate written notice thereof, with the fullest information obtainable, to the agent by whom this policy has been countersigned or to the company's home office. If a claim is made on account of such accident the insured shall give like notice thereof with full particulars."

On January 20, 1913, while such policy was in force, the automobile specially covered therein, while driven by an employee of the plaintiff, came into collision with a pedestrian. The driver made no report to the plaintiff but the next morning one Samuel Brown, the person actively in charge and manager of plaintiff's business, read in the morning paper that plaintiff's automobile had struck a boy. That same morning he interviewed the driver of the car and the driver told him that while he was driving around the corner and into the garage, a boy ran out from the curb and struck the machine and was knocked down; that the boy was only slightly hurt, for he

brushed off his clothes and went away. The driver also volunteered that he did not think it amounted to much.

No notice under the provision in the policy above quoted was given the defendant until after the commencement of suit about ten days later.

The defendant resists the action upon the ground that such provision is a condition precedent by the terms of the policy, and that failure to observe it voids the policy.

The trial court submitted to the jury, under the objection of the defendant, the question of reasonable promptness in giving the notice. Upon such submission the jury found for the plaintiff. The court also charged the jury that if according to the information plaintiff received the accident was not one which would lead a reasonably prudent and intelligent man to think it would result in a claim against the plaintiff, then that plaintiff was not bound to report it to the defendant and could recover.

These instructions were error. The precise question seems to have been passed upon by the Appellate Division in the First Department in the case of *Melcher v. Ocean Accident & Guarantee Corporation, Ltd.* (175 App. Div. 77). There the court held that these provisions in accident policies did not relate merely to those claims out of which the assured might believe a claim likely to be made, but that in each case of accident it was essential that the notice be given in order to preserve benefit from the policy.

In view of that decision we do not see how we can do otherwise than reverse and dismiss the complaint.

All concurred.

Judgment reversed and judgment directed in favor of the defendant dismissing the complaint, with costs.

AUBURN DRAYING COMPANY, Respondent, v. WILLIAM WARDELL, Individually and as Business Agent and Secretary of Local Union, No. 679, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, etc., and Others, Appellants.

Fourth Department, May 23, 1917.

Labor unions — strikes and boycotts — respective rights of employer and employees — motive — combination and conspiracy to wrongfully injure business of another — evidence justifying injunction and assessment of damages.

Suit in equity brought against the business agent and members of a local labor organization of teamsters, etc., to obtain a permanent injunction restraining acts alleged to amount to a boycott upon the plaintiff's trucking business, and to recover resulting damages. It appeared that before the alleged wrongful acts of the defendant the plaintiff had conducted a large and lucrative business; that on the organization of the local union efforts to induce the plaintiff's employees to join the same were largely unsuccessful, as well as efforts to induce the plaintiff to bring his employees into the organization. As a result of rancor and ill-feeling aroused between the plaintiff and the defendants, the latter adopted a resolution declaring the plaintiff to be "unfair," which resolution was approved by other labor organizations of the locality which sustained the attitude of the defendants. There followed a systematic campaign among the customers of the plaintiff by which strikes were threatened if they continued business relations with the plaintiff, and as a result many persons who had previously done business with the plaintiff ceased to do so, whereby the plaintiff's business was in a large part destroyed. It further appeared that upon the granting of the injunction by the trial court many of these persons resumed business relationships with the plaintiff. On all the evidence, *held*, that a decree granting the permanent injunction, with \$1,000 damages for injuries already sustained, should be affirmed.

The respective rights of employer and employees rests upon the right of individuals freely to contract, which right is guaranteed to each by our Constitution. The employees are free to contract for the disposal of their services and the employer may employ whom he will.

In the absence of contract to the contrary, either employer or employee may terminate the employment at will with or without reason for such action.

Moreover, the employee has a right to threaten to terminate the employment with or without reason, such threat being a threat to do only what he may lawfully do. The employer has the equal and coextensive right to threaten to discharge.

App. Div.]

Fourth Department, May, 1917.

Moreover, striking employees may lawfully importune customers and business associates of the employer to cease business dealings with him, in other words, induce a boycott.

But such methods cannot be used in the furtherance of an unlawful or malicious purpose, that is to say, the right of boycott cannot be made an engine of oppression for oppression's sake only. Hence, in determining the rights of parties, motive is important, for if the primary purpose of such boycott be punishment, revenge or injury, then the possible good to labor conditions cannot be made a cloak to shield the actors from the consequences of acts done in furtherance of the unlawful purpose.

Held further, that the acts of the defendants were contrary to subdivisions 5 and 6 of section 580 of the Penal Law, prohibiting conspiracies to prevent another from exercising a lawful trade or calling and acts injurious to public trade or commerce.

Subdivision 6 aforesaid is not inapplicable on the theory that the business conducted by the plaintiff could be as well done by other persons, so that public trade will not be injured, when in fact it appears that before the boycott the plaintiff was doing the major portion of that work in the locality.

As the boycott successfully put the plaintiff out of business and removed one of the competitors, it tended to disrupt and obstruct the free flow of commodities and chattels.

Irrespective of the statutes, by the common law it is unlawful to combine for the purpose of destroying the business of another.

The intent of the defendants is a question of fact for the trial court, and may be established by circumstantial evidence.

KRUSE, P. J., and MERRELL, J., dissented, in memorandum.

APPEAL by the defendants, William Wardell and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cayuga on the 3d day of November, 1915, upon the decision of the court after a trial before the court without a jury, with notice of an intention to bring up for review an interlocutory judgment entered in said clerk's office on the 29th day of March, 1915.

Frederick A. Mohr, for the appellants.

George B. Turner and *John Taber* [*Walter Gordon Merritt* of counsel], for the respondent.

LAMBERT, J.:

The action is equitable in form, seeking permanent injunction, prohibiting acts of the defendants claimed to be in furtherance of what is generally described as boycott, together with money damages. The trial court first determined the

right of the plaintiff to injunctive relief. Then, pursuant to a stipulated practice, interlocutory judgment was entered and further hearing had to ascertain the amount of money damages to be awarded. The plaintiff has succeeded in obtaining the permanent injunction sought and has been awarded \$1,000 for injuries already sustained. The appeal is from both judgments.

Plaintiff is engaged in a trucking business in the city of Auburn, and at the time of the events complained of had a large and lucrative business. Its patronage was largely made up of customers who usually employed that concern in and about the hauling and trucking of their various commodities. The service rendered was satisfactory and the proportion of the business of that character done by the plaintiff in said city was large.

So far as appears, the plaintiff had succeeded in maintaining harmonious relations with its employees, some thirty to forty-five in number. And until the events complained of in this action there does not appear to have been any general policy maintained in connection with such business either for or against the organization of such employees into associations generally described as labor unions. About November, 1912, representatives of organized labor began an agitation looking to the organization of a so-called teamsters' union in said city of Auburn. Effort was made to persuade plaintiff's employees to join that union. This effort was largely unsuccessful although in a few instances the men did join. Effort was then made by such representatives to secure the aid of the plaintiff itself in bringing such men into the organization. That effort also failed. Apparently growing out of and connected with these failures there began a feeling of rancor, somewhat mutual, between the representatives of the labor organization and the officials of the plaintiff. This feeling has given rise to charges and counter charges of harsh and unreasonable conduct upon the part of each.

Following such failures the Teamsters' Union, in July, 1913, adopted a resolution declaring the plaintiff to be "unfair." Two other concerns were declared in such resolution as unfair. But they do not seem to have been prominent in the future events in this controversy.

Following the adoption of this resolution of unfairness, the Central Labor Union, an association designed to bring together all labor organizations in the city, next took action. It attempted to negotiate with the plaintiff and, failing therein, it formally approved the declaration of "unfairness" on the part of plaintiff. Similar action was then taken by many of the other local labor organizations. All of these sustained the attitude of the Teamsters' Union and the Central Labor Union toward the plaintiff. Then there seems to have begun a systematic campaign among the customers of the plaintiff. They were notified that plaintiff was on the unfair list and their various employees gave notice that if such customers continued business relations with the plaintiff strikes would be called against them respectively. Contractors who had theretofore engaged plaintiff to haul their building material supplies were compelled to withdraw from such contractual arrangements. And in one instance where one such contractor already had a portion of his material hauled to his job by the plaintiff, he, in order to satisfy the demands of the labor organization, was compelled to haul it back to the station and then again draw it to the job by a teamster belonging to the union. This incident, perhaps, will illustrate the force of the suggestions made to the various employers by their employees. Butchers were notified that their meat cutters would quit work if the beef to be cut was hauled upon plaintiff's trucks. Bakers and merchants were likewise notified. This propaganda continued and with the result that the business theretofore enjoyed by the plaintiff was in a large part destroyed.

It is also significant that in a number of instances these business relationships, thus terminated, were at once resumed upon the granting of the injunction in this case. The conclusion is well justified that the cessation of business dealings with the plaintiff, by its various customers, was not voluntary upon their part but was induced and brought about through fear of financial loss if they persisted in ignoring the various demands of the labor organizations.

The solution of controversies such as this, whether arising between employer and employee, between rival employees or

organizations of employees, or between rival employers or organizations of such, all proceed from the common conception of the right of the individual to freely contract for disposal of his services or his goods and the individual right of the employer to employ whom he will. This is a right guaranteed to each by our Constitution and thoroughly engrafted upon our republican form of government. (*People v. Marcus*, 185 N. Y. 258; *Park & Sons Co. v. Nat. Druggists' Assn.*, 175 id. 1.) Invariably in these disputes each party to the controversy bases his attack or defense upon the standard of right and justice. The general correctness of the principle invoked must be conceded; its application is, however, frequently obscured.

Judicial decisions in the many instances which have arisen have definitely settled certain of the involved questions. There is no longer doubt but that both employer and employee have the utmost freedom of contract with relation to the hiring by the one and the working by the other. In the absence of contract to the contrary, either may terminate the employment at will, and with or without reason for such action. It is equally well settled that the employee has a right to threaten to terminate the employment with or without reason, such threat being a threat to do only what he may lawfully do. This right in the employee is balanced and sustained by the equal and coextensive right in the employer to threaten to discharge. This opens the door for the employee to say to his employer that unless he adopts a business policy suggested or even demanded by the employee, then that the employee will terminate the relationship. (*National Protective Association v. Cumming*, 170 N. Y. 315.) And as a necessary adjunct to such right it is determined by the same authority that this right in the individual permits him to urge another or others to a like course of action and thus to do in combination with others what he might lawfully do himself, i. e., to strike and to urge others to strike and all with or without reason. And he may threaten, in conjunction with others, and for insufficient or even no reason, to terminate the relationship between the employer and members of his employees.

These rights to act in community and to threaten to so

App. Div.]

Fourth Department, May, 1917.

act, approved as they are by great judicial authority, may amount to instruments of oppression in unscrupulous hands. The right thus guaranteed to the employee may not be of great consequence when confined to the individual while it becomes a great and fearsome power against the employer when participated in by a large portion, if not all, of his employees. The insistence upon the legal right to terminate the employment, backed by force of numbers and careful organization, no doubt frequently becomes a threat of financial annihilation, as much or more effective in securing acquiescence in demands than would be a threat of physical violence. However this may be, the above doctrine is thoroughly engrafted in a long line of judicial decisions and this court may not depart therefrom.

The rights of the employee in the termination of his employment, thus settled, have been likewise extended to his right to importune customers and business associates of the employer to cease business dealings with the employer. It is said that no man needs a reason for terminating all business relations with another, and that the assignment of an insufficient reason does not affect the right to so terminate such relationships. (*Gill Engraving Co. v. Doerr*, 214 Fed. Rep. 111.) This opens the door for the employee to accompany such importunities to customers and business associates with the announced intention upon the part of the employees of the latter to terminate their employment and to strike unless such customers and business associates observe the demands made.

The latter plan of action is what is known generally as a boycott. It looks to the disruption of the business connections, means of trade and livelihood of the employer, through threatened attack upon the business of such customers and business associates. Such a course of conduct has frequently received the sanction of our courts as being predicated upon certain definite and well-recognized legal and constitutional rights in the employee. (*Park & Sons Co. v. Nat. Druggists' Assn.*, 175 N. Y. 40; *Mills v. United States Printing Co.*, 99 App. Div. 611.)

The various judicial holdings to the above effect have produced a situation where both sides to these controversies

invariably insist that the result pro or con, is an invasion of legal rights. This has become so marked that it has been written that situations may and do arise in these controversies where each party asserts only constitutional and equal rights so that there is a clash of such rights. Under such circumstances it is said that equity is powerless to grant relief and that the damage ensuing is without redress. (*Gill Engraving Co. v. Doerr, supra.*)

But running throughout all the decisions upon these questions there is to be found a common thread in which is found the test which solves the rights of the parties. This common idea is that the powers and rights declared to rest in individuals or combinations of individuals, although lawful in and of themselves, are not to be used in furtherance of an unlawful or malicious purpose. In other words, the great right cannot be made an engine of oppression, for oppression's sake only. This conception first gained its foothold in this State under the case of *Curran v. Galen* (152 N. Y. 33). That decision arose upon a demurrer. The complaint charged the combination and the use of claimed rights for a malicious purpose. In discussing this aspect of malice, that court said: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice BARRETT in *People ex rel. Gill v. Smith* (5 N. Y. Cr. Rep. at p. 513), 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate.'

“ Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow-feeling which, as a social principle, underlies the association of workmen for their common benefits, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified? ”

The necessity for such a rule is obvious although perhaps best seen by illustration from extreme cases. Thus, the right to strike and to threaten to strike are lawful in and of themselves. Yet if a representative of organized labor should so far prostitute his powers as to demand of the employer the payment of tribute to him personally as a condition for not calling a strike, I assume no court would long hesitate in reaching the conclusion that the attempted use of such means for such a purpose would be unlawful. By such illustration it is not intended to suggest its presence in this case. The illustration is used solely to accentuate the necessity for the observance of the rule that lawful powers become unlawful when used as instruments of oppression and destruction of lawful rights.

The rule enunciated in *Curran v. Galen* does not seem to have been departed from in this State. It was not heartily approved in *National Protective Association v. Cumming* (*supra*), but it was followed by that authority. Attempted application of the rule has seemed frequently to make the

rights of litigants to depend upon distinctions more or less fanciful and to shroud the solution of these questions in uncertainty. Yet I anticipate that such result is brought about, not by any defect in the rule itself, but through confusion in applying the rule to the facts in the various cases.

Thus it is easily determined that a boycott or strike predicated upon violence, induced through misrepresentations, or violative of contractual rights, presents unlawful features. The lawfulness of the combination and all its effects are not so easily determined when, as here, there has been no violence or threat of it, no misrepresentation and no violation of contract for employment.

It is thus seen at the outset of inquiry it is first to be determined what motive actuated such conduct. And this inquiry itself brings confusion. There are many adjudicated cases holding that labor organizations have the right to strike and to boycott in furtherance of a purpose of general good and benefit to themselves (such as shorter hours and more pay or better working conditions). Nor does the incident of private injury necessarily attendant upon execution of such general plan render unlawful the general scheme. It seems to be conceded, however, that if the primary purpose be one of punishment, revenge or injury then the general argument of good to labor conditions cannot be made a cloak to shield the actors from the consequences of acts done in furtherance of the unlawful purpose.

I take it that the purpose, motive or intent referred to in this line of cases is the one immediately in hand. Probably no dispute of this character ever arose, not open to the argument that whatever was done was so done in the furtherance of some one's conception of what would be for the general good of organized labor. If such general argument, always available, is allowed to control, then the distinction ceases to be valuable or important and the courts might as well hold that in none of these cases is there redress. Such distinction seems to be intended by the writers of these various opinions and there seems to be always presented the primary inquiry of the real immediate object sought. If that object be one commendable then the scheme is not unlawful although

App. Div.]

Fourth Department, May, 1917.

involving private injury. If it be unlawful it may not be shielded behind general arguments of real or fancied good to organized labor.

In the case at bar the trial court has found upon ample evidence that the primary purpose sought by the defendants was the injury and destruction of plaintiff's business, and that although perhaps open to the suggestion that there was an ultimate hope of benefit to organized labor, the immediate business in hand was to injure the plaintiff. If these facts are well grounded in this record, then we have no further difficulty for such a purpose is unlawful at common law whether or not it offends any particular statute. Such a purpose cannot be justified by argument that each particular step in the transaction was lawful in and of itself.

In determining whether the intent actuating the members of the combination was legal or otherwise, we have the aid of various statutory enactments. If the acts complained of in fact violate some express statutory provision, then clearly that may be prohibited and at the suit of a private suitor. (*Kellogg v. Sowerby*, 190 N. Y. 370; *Rourke v. Elk Drug Co.*, 75 App. Div. 145.) In this connection attention is directed to section 580 of the Penal Law which provides by subdivisions 5 and 6 as follows:

"If two or more persons conspire: * * *

"5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or,

"6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

"Each of them is guilty of a misdemeanor."

It would seem that the acts found by the trial court do offend subdivision 5 of the above section 580 of the Penal Law in that they were designed to prevent the plaintiff from exercising a lawful trade or calling by threats of interference with property belonging to it. Such a conception requires that the word "property" in this instance shall be construed

to include the good will and patronage of the plaintiff. For such conclusion there is judicial authority. (*People v. Davis*, 159 App. Div. 464; *Newton Co. v. Erickson*, 70 Misc. Rep. 291; *affd.*, without opinion, 144 App. Div. 939.)

The application of subdivision 6 of section 580 is not so clear. By this subdivision it is prohibited, however, to conspire to commit any act injurious to trade or commerce. It is argued by appellants that this section can have no force upon the facts here involved for the reason that it is not proven that the carting and draying previously done by the plaintiff was not and could not be as well done by some one else. This argument is answered by the fact found that at the time of the acts complained of the plaintiff was doing the major portion of that work in the city of Auburn. The executed purpose of the combination was directed to putting the plaintiff out of business. It had substantially accomplished its purpose. This removed one of the many competitors in that line of business. It necessarily tended to disrupt and obstruct the free flow of commodities and chattels. Injury to trade and commerce was the direct result of the executed purpose of the combination and being the direct result, the consequence must be presumed to have been intended.

But besides and beyond this statute to combine for the purpose of the destruction of another's business is unlawful at common law and such seems to have been the uniform holding of our courts from the time of *Curran v. Galen* (*supra*) and we, therefore, return to the consideration of the evidences of such a purpose to be found in this record.

The intent and object of this combination were properly handled by the trial court as a question of fact. Intent is always a fact. It deals with the mental operations of the conspirators. Such mental conception is usually, as here, susceptible of proof only circumstantially. Men's motives and objects are judged by their overt acts, purpose invariably preceding each act. These findings of intent, then, are to be sustained upon the entire record in the case, if at all.

It appears that the subject of controversy involved in this case was not primarily one of wages. The object sought and resisted was the recognition of organized labor and its employment by plaintiff. Upon failure of the defendants to enlist

App. Div.]

Fourth Department, May, 1917.

the men generally and their further failure to procure the support and interest of the plaintiff itself, these defendants then sought to force the result they had been unable to procure otherwise. Their first step was to list the plaintiff as unfair. In the parlance of labor organizations this meant simply non-recognition of and failure to employ organized labor as such. Unfortunately the term is not always understood by others than the labor combinations. Various organizations only remotely related were induced to lend their support and to enforce their moral support, with demand upon their various employers. Each of such employers had recognized organized labor. Such were required to desist from all business dealings with the plaintiff. And, urged by the great labor organizations and the combination of the various unions, such a demand was substantially a threat. To resist it meant serious financial loss and disruption of business. The various employers adopted the expected course, actuated by self-interest, and such had no primary interest in the dispute between the parties to this litigation. Their acquiescence was unwilling and forced. The intent as evidenced by these acts was to deprive the plaintiff of all patronage unless it yielded to the demands of these organizations. That such was the purpose and that it looked to the complete destruction of plaintiff's business, if necessary, to bring about that result, cannot be gainsaid upon this record. It is no answer to say that such a course of conduct might ultimately result in benefit to organized labor through bringing within its dominion all of this class of business. Such a remote and ultimate hope does not hide the primary purpose of the destruction of property rights. I deem the findings in this respect to be well grounded, and I, therefore, conclude that the trial court properly disposed of this question of fact and reached a result well sustained by this record.

Such a destructive purpose renders unlawful the entire combination and, despite some judicial expressions to the contrary, the time has not yet come when the courts of this State are powerless to interfere and preserve constitutional and property rights thus assailed. In fact, failure or laxity of the courts in this respect must and can work only injury both to the employer of labor and to organized labor itself.

The judgment appealed from should be affirmed, with costs.

All concurred, except KRUSE, P. J., and MERRELL, J., who dissented in a memorandum by KRUSE, P. J.

KRUSE, P. J. (dissenting):

The controversy between the parties is whether the work of teaming, which the plaintiff has to do, shall be done by union labor or non-union labor. The plaintiff contends that it favored the open shop policy, willing to treat union and non-union labor alike and with equal fairness, while the defendants contend that the plaintiff in fact discriminated against and was unfair to union labor. The defendant the Central Labor Union is the central body with which the other defendant labor unions, including the teamsters' local union, are connected. After the organization of the Teamsters' Union a representative of the Central Labor Union and the president of the local Teamsters' Union tried to persuade the president of the plaintiff to aid them in having the plaintiff's teamsters join the local Teamsters' Union, but the suggestion did not meet with favor, though he professed to be neutral. He was president of the Citizens League, which was an organization in the interest of the employers, and none too friendly to organized labor.

Upon the refusal of the plaintiff to assist them to have its work done by union labor the plaintiff was placed upon the unfair list. That means, according to the findings of the trial court, an employer who refuses to treat with the labor organizations, refuses to employ union labor, and refuses to give to his employees the conditions asked for by labor organizations with respect to hours of labor, shop conditions and other similar working conditions.

The judgment undertakes to relieve the plaintiff from the effect of placing it upon the unfair list by enjoining the defendants from enforcing rules or orders which require their members to quit the service of employers who patronize the plaintiff.

The decision seems to rest upon the proposition that there was an unlawful combination and conspiracy (1) to prevent the plaintiff from carrying on its business by threats and

App. Div.]

Fourth Department, May, 1917.

intimidation; and (2) to commit acts injurious to trade and commerce.

None of the defendants had any ill will toward the plaintiff or the teamsters in its employ. Their sole and only purpose in placing the plaintiff upon the unfair list was to have the plaintiff's teaming work done by union labor. Neither was there any force or violence used to accomplish that purpose. I think it clearly appears that the primary purpose of the defendants was not the destruction of the plaintiff's business, but the resulting injury was a mere incident in accomplishing a lawful purpose. The destruction of plaintiff's business would harm rather than benefit the defendants. There would be one less business enterprise requiring labor.

The trial court finds that the ultimate hope of the defendant was to better the conditions of the members of the union, by bringing into its organization all of the craftsmen and laborers in Auburn, so that their united efforts for higher wages, shorter hours and better working conditions might be more persuasive and effectual, and that without such motive or ultimate purpose the boycott would not have been inaugurated. This purpose is quite in accord with the declarations of principles and the constitutions and by-laws of the various defendant labor organizations. They declare it to be the duty of every laboring man to use his utmost endeavors to secure the amelioration of the laboring classes generally, and to that end unite the various trades and labor organizations of the city so as to form one brotherhood for the defense of the rights and protection of the interests of the laboring masses. They favor the rigid enforcement of all existing beneficial labor laws, especially those requiring compulsory education and the abolition of the truck system, favor arbitration and the use of every honorable means to adjust difficulties which may arise between workmen and employers, and to labor assiduously for the development of a plan of action that may be beneficial to both parties.

If the purpose of this combination was simply to carry out these declared principles and purposes, I think the combination was not illegal, although what was done had the effect to injure the plaintiff's business. Employees, as well as employers, are injured every day in their trade and employ-

ment by their competitors, and if the means are not unlawful they are without legal redress. It should be borne in mind that this action is not to redress any grievance or enforce any right of either the plaintiff's teamsters or the plaintiff's customers, and the question is not whether the plaintiff has been or will be injured, but whether the injury is the result of an illegal combination and unlawful acts.

While these organizations, outside of the central organization, are composed of different classes of laborers, they are in fact associated together as one body in a common purpose for their own betterment. To accomplish this purpose I think they had the right to say to the employers: If you employ the plaintiff, who refuses to recognize us and give our members employment, we will refuse to work for you.

Much has been said and written upon the subject of boycott. The word itself is comparatively new, but the practice is as old as human history. It has been used frequently and effectively in all sorts of controversies, both by individuals and nations. The decisions of the courts are by no means in accord upon the question, and to collate them and enter into a long discussion of them would serve no useful purpose. This diversity of opinion exists in nearly every State of the Union, as well as in the Federal courts.

I content myself by citing but one decision, that of the Court of Appeals of this State (*National Protective Assn. v. Cumming*, 170 N. Y. 315). The question was there elaborately discussed by three of the judges. While they were not in accord, nearly all, if not every member, agreed to certain principles laid down in that decision. I forbear to quote at length from the opinions, but all the judges agreed to the proposition that workingmen have the right to organize to secure higher wages, shorter hours of labor, and to better their conditions generally. They have the right to strike and to cease work in order to secure any lawful benefit to the members of the organization, and they have the right to do all these things as a body and by prearrangement, provided the object is not to gratify malice or inflict injury upon others.

I think the doctrine of that decision requires the reversal of this judgment. If the purpose of placing the plaintiff upon the unfair list had been merely to injure the plaintiff,

App. Div.]

Second Department, May, 1917.

and the request to employ union teamsters a mere pretext, the action of the defendant was unjustified and illegal. But if it was to obtain the work for the defendant's members they acted within their legal rights, although it had the effect of displacing others, and to injure the plaintiff's business.

I think that judgment should be reversed and the complaint dismissed.

MERRELL, J., concurred.

Judgment affirmed, with costs.

SARA F. ROBERTSON, as Administratrix, etc., of WALTER A. ROBERTSON, Deceased, Respondent, v. CHARLES B. TOWNS HOSPITAL and CHARLES B. TOWNS, Appellants.

Second Department, May 11, 1917.

Negligence — failure of hospital attendants to guard against suicide of patient — evidence raising question for jury — duties of private hospital corporation and attendants — failure to prove whether hospital was operated by corporation or by individual defendant.

Action against an incorporated hospital and an individual as codefendants to recover for the death of a patient who was being treated for alcoholism and who committed suicide by breaking the glass of a lavatory window and leaping therefrom. There was no evidence that the decedent had exhibited indications of suicidal mania, but there was evidence to the effect that he suffered from an alcoholic delusion that he was threatened with bodily injuries from an imaginary foe from whom he had an impulse to escape. Evidence examined, and *held*, to raise a question for the jury as to whether the physician or nurse in attendance should not, in the exercise of the requisite skill and care, have foreseen the casualty and have protected the decedent from the unguarded window in the bathroom.

It is the duty of the owner of a sanatorium conducted for private gain to use reasonable care and diligence not only in treating but in safeguarding a patient, measured by the capacity of the patient to provide for his own safety. And to this end physicians and nurses possessing reasonable learning and skill such as is ordinarily possessed by persons similarly engaged must be employed, and they must act with reasonable care and diligence.

A verdict for the plaintiff against both the corporation and the individual defendant will be reversed, however, where there was no evidence upon which the jury could base a finding that the hospital was operated by the corporation and by the individual defendant jointly as master of the negligent servant.

APPEAL by the defendants, Charles B. Towns Hospital and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 28th day of March, 1916, upon the verdict of a jury for \$12,500, and also from an order entered in said clerk's office on the same day denying defendants' motion for a new trial made upon the minutes.

I. R. Oeland [Owen W. Bohan with him on the brief], for the appellants.

Henry A. Uterhart, for the respondent.

STAPLETON, J.:

An administratrix of a decedent recovered damages against a corporation and an individual for neglect which caused her intestate's death. The decedent periodically was a heavy drinker of intoxicating liquor. A day came when his family physician, finding him suffering from alcoholism, advised him to go to a sanatorium for treatment. He was admitted on that day, March 11, 1915. His treatment was paid for. The person who received him and with whom the arrangements were made said good care would be given him. He was assigned to a room on the third floor, which he shared with a patient named Munnich. The one window in that room was guarded with a metallic grating. There is no evidence that between the date of his admission and the following Sunday, March 14, 1915, he was afflicted with delirium or was of unsound mind. On the afternoon of that Sunday he was visited by his wife, who remained with him until about six o'clock. About eight o'clock a doctor and a nurse attached to the hospital found him in the room with an uplifted pitcher in his hand, after he had driven forth his room mate, Munnich. The doctor's attention was attracted to the incident by having heard, while in his own room, a few feet away, a sound like "rattling the screen;" that is, the metallic grating on the window. To the doctor and the nurse decedent falsely charged Munnich with an attempt to kill him. He was thereupon persuasively subdued and his fear apparently dispelled. He then started for the lavatory, which he had been accustomed to use daily. He was required to wait an instant while another person, who was using it, came out. He entered,

App. Div.]

Second Department, May, 1917.

closing the door leading to it. The female nurse, seeing him go in, asked the doctor to accompany him. The doctor was about to do so instantly when he heard a crash. He rushed in. He saw the body of the decedent falling through the window, which was of ground opaque glass and was not guarded. He grasped the decedent but could not hold him, and he fell to the ground. A few minutes afterwards decedent died from the injury thus caused.

There is no evidence that he had suicidal mania. An effort to show by opinion evidence that he had delirium tremens was unsuccessful. In answer to a hypothetical question, a skilled witness, who had not seen the patient, testified to an opinion that the patient was mentally affected by alcohol and that he had delusions. The fact that the patient jumped through the window was a help to the doctor in forming that opinion. Suicide is not among the tendencies of those suffering from the delusions to which the doctor referred. One of the delusions is that the patient feels that something is going to happen to him. The doctor testified: "The majority of cases I have come in contact with they are afraid somebody is after them. They are either chasing them with a gun, ax or a knife. They have fear always somebody is after them and they are trying to escape. They have fear of being killed or injured." The judgment of the patient is poor. In reciting the foregoing, we have been summarizing evidence, and not stating propositions necessarily sound.

It is the duty of the owner of a sanatorium conducted for private gain to use reasonable care and diligence not only in treating but in safeguarding a patient, measured by the capacity of the patient to provide for his own safety. In the discharge of this duty, physicians and nurses possessing that reasonable degree of learning and skill that is ordinarily possessed by persons similarly engaged must be employed, and they must act with reasonable care and diligence. (*Hogan v. Hospital Company*, 63 W. Va. 84, cited in *Stone v. Eisen Co.*, 219 N. Y. 205.)

The case is barren of evidence that conscious suicide should have been foreseen. There is, however, evidence that the patient had a delusion that his room mate had a design to kill him, and it is inferable that he shook the window screen

in his bedroom in an attempt to escape from his imaginary assailant. There is evidence that he had alcoholic delusions and that fear of bodily harm and an impulse to escape an imaginary foe are characteristic of these delusions. There is evidence that the delusion may manifest itself, disappear and shortly recur. There is evidence that he was placed in a room with a guarded window.

We think the evidence recited presents a question for the jury as to whether the physician or the nurse should not, in the exercise of the requisite skill and care, have foreseen such a casualty and protected the decedent from the unguarded window in the bathroom. (*Hogan v. Hospital Co.*, *supra*; *Wetzel v. Omaha Maternity & General Hospital Assn.*, 96 Neb. 636.)

The judgment must be reversed, however. The verdict is against both the corporate and the individual defendant. There was evidence upon which the jury might have found either liable, but no evidence upon which they could be held jointly. The physicians and the nurse were not the servants of both. The jury did not decide who was the master. The corporation operated the hospital or it did not. If it did, it could be liable; if it did not, and the individual defendant was the actual operator and master, why should there be a judgment against it?

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., MILLS and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. TRANSIT DEVELOPMENT COMPANY, Appellant. (Appeal No. 1.)

Second Department, May 25, 1917.

Labor Law, section 8a, construed — "factory" — emergency repair shop in power house.

An emergency repair shop maintained by an electric railway company at its power house, where only lighter parts are made and only four or five machinists and their helpers, seven or eight men in all, are employed

is a "factory" within the meaning of section 8a of the Labor Law, providing for twenty-four consecutive hours of rest in every calendar week. In construing this section the court should endeavor to ascertain its fair and reasonable meaning, avoiding a construction which either extends or limits its meaning beyond that which was evidently intended.

APPEAL by the defendant, Transit Development Company, from a judgment of a Court of Special Sessions held by a city magistrate of the city of New York rendered on the 23d day of October, 1916, convicting the defendant of violating section 8a of article 2 of the Labor Law. (See Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 8a, added by Laws of 1913, chap. 740, as amd. by Laws of 1914, chaps. 388, 396, and Laws of 1915, chaps. 321, 357, 648.)

M. B. Hoffman [*George D. Yeomans* with him on the brief], for the appellant.

Harry G. Anderson, Assistant District Attorney [*Harry E. Lewis*, District Attorney, with him on the brief], for the respondent.

STAPLETON, J.:

The Transit Development Company, a subsidiary corporation of the Brooklyn Rapid Transit Company, is engaged, at its Kent avenue power house, in generating and supplying electricity for the operation of the several lines, street and elevated, of that railroad system. In the basement, closed in by "a little curtain wall," there is a machine shop, operated by power, where small parts, such as pistons and valve rods, are made and kept in stock for use when needed, and where old parts are repaired. The shop is used principally for emergency purposes. The machinists there employed assembled parts and adjusted them when machines broke down. They had to do any other work in the power house that they were required to perform. Only the lighter parts are made in the shop, the heavier stuff being sent to the regular maintenance shops, which are remote from the power house, one being in East New York and the other at Bay Ridge.

In the shop were four or five machinists and their helpers — seven or eight men in all. Among them was one Machiels,

a machinist, who, to a factory inspector for the State Industrial Commission, complained that between May 14, 1916, and May 21, 1916, both dates inclusive, he was not allowed twenty-four consecutive hours of rest. An information, signed by the factory inspector, accused the Transit Development Company of having unlawfully violated and omitted "to comply with the provision of section 8-a-3 of article II of an act of the Legislature of this State, entitled 'An Act relating to labor, constituting chapter 31 of the Consolidated Laws,' being chapter 36, Laws of 1909, as amended, in that it as proprietor of the machine shop factory at 502 Kent avenue, borough of Brooklyn, city of New York, did not allow at least twenty-four consecutive hours of rest during the aforementioned period, a calendar week, to one August Machiels of 57 South 10th street, borough of Brooklyn, city of New York, who was employed in said factory during said period."

In a Court of Special Sessions held by a city magistrate the Transit Development Company was convicted of having violated the statute and was sentenced to pay a fine of twenty dollars. (See Penal Law, § 1275, as amd. by Laws of 1913, chap. 349.) From that judgment it appeals to this court.

The question at issue is whether the appellant was engaged in maintaining a factory within the meaning of the statute. "In construing this statute we should endeavor to ascertain its fair and reasonable meaning, avoiding a construction which either extends or limits its provisions beyond that which was evidently intended." (*Schapp v. Bloomer*, 181 N. Y. 125, 128.) The statute (Labor Law, chap. 36, Laws of 1909, constituting Consol. Laws, chap. 31, as amd. by Laws of 1913, chap. 740; Laws of 1914, chap. 396; Laws of 1915, chap. 648) in part reads:

"§ 8-a. One day of rest in seven. 1. Every employer of labor engaged in carrying on any factory or mercantile establishment in this State shall allow every person, except those specified in subdivision two, and as otherwise herein provided, employed in such factory or mercantile establishment at least twenty-four consecutive hours of rest in every calendar week."

Machiels was not in one of the excepted classes.

Section 2 of the Labor Law, as amended by chapter 650 of

the Laws of 1915, defining "factory" and "work for a factory," reads:

"The term factory when used in this chapter, shall be construed to include any mill, workshop, or other manufacturing or business establishment and all buildings, sheds, structures or other places used for or in connection therewith, where one or more persons are employed at labor, except dry dock plants engaged in making repairs to ships, and except power houses, generating plants, barns, storage houses, sheds and other structures owned or operated by a public service corporation, other than construction or repair shops, subject to the jurisdiction of the Public Service Commission under the Public Service Commissions Law. Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons."

The appellant argues that the fair and reasonable meaning of the words "construction or repair shops" should be limited to those repair and construction shops where general construction and repair work is carried on, and should not be extended to include purely maintenance work in a generating plant. It further argues that the phrase "other than construction or repair shops" modifies "other structures" and does not refer back to "power houses, generating plants, barns, storage houses, sheds." We are not convinced by either argument.

From the operation of the statute, the Legislature, by definition, specifically exempted power houses and generating plants owned or operated by a public service corporation; but then, with particularity, it excludes repair shops from the benefit of the exemption. No distinction is expressed between a shop in which emergency repairs are made and a shop in which general repairs are made. The workshop in which Machiels was employed is a repair shop. Had it been housed in a building separate and apart from the power house, there would not, we think, be any question that those

Third Department, May, 1917.

[Vol. 178.]

employed in it are entitled to twenty-four consecutive hours of rest in every calendar week. Why should the circumstance that it is operated under the same roof make a difference? We cannot reason why.

The judgment of conviction of the Court of Special Sessions should be affirmed.

JENKS, P. J., THOMAS, MILLS and RICH, JJ., concurred.

Judgment of conviction of the Court of Special Sessions affirmed.

FRED R. BUTTERFIELD, Appellant, v. THE STATE OF NEW YORK, Respondent.

Third Department, May 2, 1917.

Court of Claims — Code of Civil Procedure, section 264, construed —
“notice of intention to file claim.”

Where a claim is filed with the Court of Claims and with the Attorney-General within six months after it accrues, it is equivalent to a “notice of intention to file,” and is a substantial compliance with section 264 of the Code of Civil Procedure.

The object of said requirement of the Code is to enable the State to prepare to meet the claim, and if the claim is filed in both offices within the six months, it must be equivalent, for all practical purposes, to giving notice that the claim will be filed.

APPEAL by the plaintiff, Fred R. Butterfield, from a decision and judgment of the Court of Claims, entered in the office of the clerk of said court on the 8th day of June, 1916, dismissing his claim.

W. E. Young [*W. Chase Young* of counsel], for the appellant.

Egburt E. Woodbury, Attorney-General [*Edmund H. Lewis*, Deputy Attorney-General, of counsel], for the respondent.

KELLOGG, P. J.:

A single question is presented on this appeal—whether the filing of a claim with the Court of Claims and with the Attorney-General, within six months after it accrues, is a substantial compliance with section 264 of the Code of Civil Procedure, from which we quote: “No claim * * * shall

App. Div.]

Third Department, May, 1917.

be maintained against the State unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the Court of Claims and with the Attorney-General a written notice of intention to file a claim against the State, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths."

The Court of Claims (10 State Dept. Rep. 38, 42) felt constrained by *Cottriss v. Village of Medina* (139 App. Div. 872) to dismiss the claim on the ground that such notice had not been filed. In that case the cause of action arose July 24, 1908. The charter of the village of Medina* required that all claims for damage "shall within six months after the happening of such damage or injury, be presented to the board of trustees of said village, by a writing signed by the claimant and properly verified by him, describing the time, place, cause and extent of the damage or injury, and the omission to present such claim as aforesaid within said time shall be a bar to any action or proceeding against said village. No action for any such damage or injury shall be maintained unless commenced within two years from the happening of the same." The action was brought within two months after the injury, but it was held that the plaintiff could not recover as no verified claim was presented as required by statute. The decision was right, and was within the true spirit of section 322 of the Village Law then in force (Laws of 1908, chap. 300, now Village Law, sec. 341 in the Consolidated Laws).† Those statutes providing that the action shall not be brought within thirty days after the claim is so presented, make it clear that the notice is required not only to enable the village to prepare its defense and ascertain the facts, but also to adjust and settle the claim before suit and thus save the expense of litigation.

The Code provision we have been considering was not intended to protect the State from costs, as the Court of

* See Laws of 1874, chap. 39, tit. 10, § 30, as added by Laws of 1886, chap. 293. Now Laws of 1909, chap. 545, § 270.—[REP.]

† See Village Law (Gen. Laws, chap. 21; Laws of 1897, chap. 414), § 322, as amd. by Laws of 1908, chap. 300; now Village Law (Consol. Laws, chap. 64; Laws of 1909, chap. 64), § 341.—[REP.]

Claims does not impose costs. (See Code Civ. Proc. § 274.) The object of the requirement is to enable the State to prepare to meet the claim, and if the claim is filed in both offices within the six months, it must be equivalent for all practical purposes to giving notice that the claim will be filed. The statute does not say that a claim shall not be filed unless the notice is given, or that the claim does not accrue, but recognizes the fact that the claim has accrued, that it may be filed; but says that it shall not be maintained unless such notice is filed.

If we disregard the spirit and follow the strict letter of the statute, and the claim is filed within the six months and then the claimant thinks it necessary to file the notice, he may do so within the six months and the statute is complied with. In such a case the notice is a mere idle form; the statute should be interpreted to give it a reasonable and practical meaning. No suggestion can be made of any possible injury or detriment to the State, if within the time, instead of receiving a notice that the claim will be filed, it is actually filed. The claim as filed would necessarily contain more information than the notice that the claim will be filed. The giving of the notice of intention is in no sense declared to be a condition precedent to filing the claim, and if the claim is actually filed within the time required for the notice, the notice would be a mere unmeaning formality. The statute from its language and from its spirit, in village cases, makes the filing of the claim a condition precedent to a right of action.

We conclude, therefore, that the claim itself having been filed with the Attorney-General and the Court of Claims within the six months, it was unnecessary to file a notice within that time of an intention to file it. The filing of the claim is the result of an intent to file it, and may be said to be a notice of an intention to file it, as the intent to file necessarily accompanies the filing. The officers receiving the claim have not only a notice of the intent to file it, but notice that the claim is actually filed, and have all the notice the law contemplates. If the notice of an intention to file the claim and the claim itself are filed at the same time, no criticism could be made, except that the filing of the intention is

App. Div.]

Fourth Department, May, 1917.

unnecessary because it is necessarily merged in the claim itself when filed. The claimant has not only declared that he intends to do something, but has actually done it. The notice of the intention and the filing of the claim consist of one act in this case, and they have the same effect as if they were two separate acts.

Undoubtedly the service of a notice of an intent to file a claim within the time provided by the statute is a condition precedent which must be performed before a recovery can be had. We simply hold that if the claim is filed in both offices within the six months, it is equivalent to a notice of an intention to file it, and that the claim in such case is properly before the court.

The Court of Claims dismissed the claim upon the ground that a notice of an intention to file was not given. It did not pass upon the merits nor determine just when the claim accrued. We are not passing upon that question, as it should be determined by the Court of Claims, together with the other facts in the case.

The judgment is, therefore, reversed and the matter remitted to the Court of Claims for its further consideration, with the right to take such other evidence as in its judgment may be proper.

All concurred.

Judgment reversed and matter remitted to the Court of Claims for further consideration with the right to take such other evidence as in its judgment may be proper.

EMMA JOHNSON, Respondent, v. THE CITY OF BUFFALO,
Appellant.

Fourth Department, May 2, 1917.

Municipal corporations — injury to pedestrian by slipping and falling upon icy sidewalk — evidence.

In an action against a city to recover for personal injuries sustained on a certain date by slipping and falling upon ice upon a sidewalk, plaintiff's evidence tended to show that the ice at the place where she fell was from one to two inches in thickness, very hard, rough, uneven and that one

witness had slipped upon it four days before, and it had impressed others as being dangerous. The defendant called no witnesses except the government weather observer and relied upon his record as showing that the icy condition was produced by alternate rain, snow, thawing and freezing on the two days preceding the accident.

Held, on all the evidence, that a judgment in favor of the plaintiff should be affirmed.

APPEAL by the defendant, The City of Buffalo, from a judgment of the County Court of Erie county in favor of the plaintiff, entered in the office of the clerk of said county on the 31st day of October, 1916, upon the verdict of a jury for \$1,350, and also from an order entered in said clerk's office on the 13th day of November, 1916, denying defendant's motion for a new trial made upon the minutes.

William S. Rann [*Frank C. Westphal* of counsel], for the appellant.

Jerome Squires [*Ford White* of counsel], for the respondent.

PER CURIAM:

Plaintiff has recovered a verdict for personal injuries sustained at nine-thirty A. M., April 9, 1914, by slipping and falling upon ice upon a sidewalk.

There was evidence from which the jury could find that the icy condition claimed to be dangerous to pedestrians had existed at the place of the accident for at least two weeks.

The jury were instructed that plaintiff could not recover unless the ice on the sidewalk was so dangerous as to be likely to result in an injury to a person using the walk. Also that it was an unusual condition and one that had existed for such a length of time that the city authorities ought to have known about it. That by "unusual condition" was meant a condition not ordinarily and generally produced by the winter weather in the locality. Also that the dangerous condition had existed prior to April seventh.

Plaintiff's evidence tended to show that the ice at the place where she fell was from one to two inches in thickness, very hard, rough and uneven. One witness had slipped upon it four days before and it had impressed others as being dangerous.

No witnesses were called in behalf of the city, except the government weather observer, by whose records it appeared that on April fourth there was a heavy snow fall, and light snow on the fifth and sixth. On the seventh rain began at three-five P. M. and continued until after midnight — "a good heavy rainfall." Rain changed to snow at one A. M. on the eighth, and it continued to snow until twelve-fifty P. M., with a total fall of two and one-half inches. On the ninth it began snowing at eight-thirty-five A. M. and continued until some time after plaintiff's accident at nine-thirty A. M. It also appeared that the snow was four inches deep at eight A. M. on the fifth, but melted rapidly in the sunshine during the day. The snow that fell on the sixth melted upon reaching the ground. The observer's record also contained this note of conditions on the eighth: "At 8:00 A. M. the ground was covered with $1\frac{1}{2}$ inches of moist snow. Another inch of snow fell between 8:00 A. M. and noon, covering the streets and sidewalk with a mixture of snow and water that made itself disagreeable for pedestrians and transportation."

The temperature on the seventh was above freezing (thirty-two degrees) after eight A. M. It was raining. On the eighth it alternated above and below freezing during the day until five P. M., when it began falling and reached twenty-three degrees at eleven P. M. and fell rapidly after that, and at six and seven o'clock on the morning of the ninth it was down to twenty degrees, and rose to twenty-four degrees between nine and ten o'clock.

Counsel for the city relies upon this record as showing that the icy condition on the morning of the ninth was produced by the alternate rain, snow, thawing and freezing on the seventh and eighth.

The jury were instructed that if such was the case they must find a verdict in defendant's favor. The jury has accepted as true the testimony of plaintiff's witnesses to the effect that hard ice of about the same thickness and rough and uneven condition had covered this walk at the place of the accident for at least two weeks prior to the accident. The city had no witnesses to the contrary, nor did it show that if such condition existed, it was usual in that part of the city at that time.

Under these circumstances, we think a recovery was permissible within the authorities. (See *Harrington v. City of Buffalo*, 121 N. Y. 147; *Williams v. City of New York*, 214 id. 259; *Gaffney v. City of New York*, 218 id. 225.)

We cannot say that the verdict is against the weight of the evidence, and we find no erroneous rulings at the trial which require a reversal.

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

KATE D. ELLERS, as Administratrix, etc., of CHARLES E. ELLERS, Deceased, Respondent, v. ERIE RAILROAD COMPANY, Appellant.

Fourth Department, May 2, 1917.

Railroad — negligence — death of station agent struck by fast passenger train while attempting to cross tracks — evidence — contributory negligence — duty of railroad company to give warning of approach of trains — peculiar whistle or signal denoting character of train not required.

In an action for the death of a former station agent familiar with the difference between the warning whistles of fast through trains and of locals, it appeared that the decedent seeing the approach of a fast through passenger train running at the rate of sixty miles an hour upon the schedule time of a slow local passenger train, and whistling as it approached in a manner peculiar to the latter train, attempted to cross the tracks before said train, when it was so near the station that it could not be stopped in time.

Evidence examined, and *held*, insufficient to establish the negligence of the defendant and that the decedent had been guilty of contributory negligence.

A railroad company is not required to give a peculiar warning whistle or signal to apprise the public as to the character of approaching trains. It is enough if it gives a sufficient and timely warning of their approach.

LAMBERT and MERRELL, JJ., dissented.

APPEAL by the defendant, Erie Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff,

App. Div.]

Fourth Department, May, 1917.

entered in the office of the clerk of the county of Erie on the 13th day of October, 1916, upon the verdict of a jury for \$10,000, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Moot, Sprague, Brownell & Marcy [John W. Ryan of counsel], for the appellant.

Hamilton Ward, for the respondent.

KRUSE, P. J.:

The plaintiff's intestate attempted to cross the tracks at Alden station, upon which a fast moving passenger train was coming. He just failed to get across before the train reached him and lost his life. The verdict rests upon a finding that the defendant was negligent in running a fast through passenger train upon the schedule time of a slow local passenger train, whistling as it approached, in a manner peculiar to the latter train. The local train usually stopped at this station, the through train did not.

The evidence as to the difference between the warning whistles of the fast through trains and those of the locals is not very satisfactory. But we may assume upon the disposition of this appeal that there was a difference, and that Ellers, who had been station agent at this station for many years up to within a few years before his death, was familiar with the difference. It is not claimed that the engineer could have stopped his train in time to have avoided the accident after it became apparent that Ellers intended to cross the tracks. The train was running at the rate of sixty miles an hour, and was then so near the station that it could not be stopped in time.

Nor is it claimed that Ellers was not aware of the approach of the train. He heard the warning whistle and saw the train coming, but evidently he thought that it was the local train which he intended to take. The evidence shows that he had left a basket of eggs at the station, had gone across the tracks to the hotel, ordered a drink, invited others to drink with him. After he had taken the drink the whistle of the approaching train was heard by those in the barroom. Thereupon Ellers

said to the bartender: "Give me my change, I must get over and get my basket, that is my train." He took his change, hurried toward the door. After he got out he looked up the track directly at the train. The train was coming from the east and he was crossing northerly to the crossing upon the walk which leads from the hotel to the walk in front of the station. He started on a little run to cross the track, as one of the witnesses testifies, he looked at the train, he kept getting closer to the train and the train was getting closer to him, as he ran across the track. The witness thought he was over, but just then something on the side of the engine hit him and knocked him to the feet of the witness, who was standing upon the depot platform.

I am of the opinion that the plaintiff failed to make out a case of actionable negligence. I am not aware of any rule of law that requires a railroad company to give a peculiar warning whistle or signal to apprise the public as to the character of the train. It is enough if it gives a sufficient and timely warning signal of its approach.

As to the question of contributory negligence, I have no doubt that Ellers supposed this was the local train, and if it had been the accident would not have happened. But if I am right in the conclusion that the railroad company owed him no other duty than to give him timely warning, and that he had no right to rely upon the peculiar nature of the whistle, he was guilty of contributory negligence. The conduct of Ellers in attempting to cross ahead of this approaching train was highly imprudent. He took the chance and lost.

The judgment and order should be reversed and the complaint dismissed, with costs.

All concurred, except LAMBERT and MERRELL, JJ., who dissented and voted for affirmance.

Judgment and order reversed and complaint dismissed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE MOTT WHEEL WORKS, Respondent, v. HARRY R. HAYES, as Commissioner of Public Works of the City of Utica, N. Y., Appellant.

Fourth Department, May 9, 1917.

Eminent domain — elimination of grade crossings, city of Utica — right of adjoining owner to damages — mandamus to compel condemnation — effort to purchase easements is prerequisite.

By virtue of section 99 of the Second Class Cities Law a landowner in the city of Utica is entitled to damages consequent upon the change of grade in the city street made to eliminate a railroad grade crossing.

But a peremptory writ of mandamus commanding the commissioner of public works of the city to institute condemnation proceedings to determine the damages sustained by a landowner by reason of such change of grade should not issue until said commissioner has made an effort to acquire the rights by purchase pursuant to the provisions of section 92 of the Railroad Law, for it is only in case that he is unable to effect such purchase that he may proceed to condemnation.

APPEAL by the defendant, Harry R. Hayes, as commissioner, from an order of the Supreme Court, made at the Oneida Special Term and entered in the office of the clerk of the county of Oneida on the 16th day of December, 1916, granting a peremptory writ of mandamus commanding the defendant to institute condemnation proceedings to determine the amount of damages sustained by the relator by reason of the change of grade of Pleasant street in the city of Utica, adjoining the lands of relator so as to eliminate the grade crossing of that street by the tracks of the New York, Ontario and Western Railroad Company, pursuant to an order of the Public Service Commission.

Nicholas G. Powers, for the appellant.

Miller & Williams [*Seward A. Miller* of counsel], for the respondent.

PER CURIAM:

That relator is entitled to damages consequent upon the change of grade of Pleasant street by virtue of section 99 of the Second Class Cities Law (Consol. Laws, chap. 53; Laws of

1909, chap. 55) applicable to Utica, and section 92 of the Railroad Law (Consol. Laws, chap. 49 [Laws of 1910, chap. 481], as amd. by Laws of 1913, chap. 744), is settled in principle by several decisions. (See *Matter of Torge v. Village of Salamanca*, 176 N. Y. 324; *Matter of Melenbacker v. Village of Salamanca*, 188 id. 370; *Matter of Dupont*, 217 id. 612; *Matter of Grade Crossing Comrs.*, 154 id. 550; *People ex rel. Dole v. Town of Hamburg*, 58 Misc. Rep. 643; 127 App. Div. 948; *affd.*, 193 N. Y. 614, on opinion of HAIGHT, J., in *Smith v. Boston & Albany R. R. Co.*, 181 id. 132; *People ex rel. Dawson v. Duffey*, 177 App. Div. 949, on authority of *People ex rel. Dole v. Town of Hamburg*.)

We are of opinion, however, that appellant, the commissioner of public works, by the express terms of section 92 of the Railroad Law, must, before instituting condemnation proceedings to acquire relator's easements, seek to acquire the same by purchase. It is only in case he is unable to effect such purchase that he may proceed to condemnation.

The order appealed from should, therefore, be modified so as to require appellant to acquire relator's easements by purchase, if he can do so upon terms satisfactory to the city and the railroad company, and if unable to do so, then to proceed by condemnation. As so modified, the order should be affirmed, without costs.

All concurred.

Order modified in accordance with opinion and as so modified affirmed, without costs of this appeal to either party.

LOUIS GARNO, Respondent, v. HENRY P. BURGARD, Appellant.

Fourth Department, May 16, 1917.

Negligence — injury by steam shovel — alleged intoxication of operator — evidence not justifying recovery.

Action to recover for personal injuries caused by the operation of a steam shovel, the defendant's liability being predicated upon the intoxication of the employee who was operating the machine. Evidence examined, and held, that a judgment for the plaintiff should be reversed because plaintiff's

App. Div.]

Fourth Department, May, 1917.

evidence as to the intoxicated condition of the defendant's servant was inherently improbable and unworthy of credence and because the evidence to the contrary was overwhelming.

APPEAL by the defendant, Henry P. Burgard, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oswego on the 19th day of October, 1916, upon the verdict of a jury for \$7,500, and also from an order entered in said clerk's office on the 11th day of October, 1916, denying defendant's motion for a new trial made upon the minutes.

Falk, Phillips & Schlenker [*E. C. Schlenker* and *Eugene L. Falk* of counsel], for the appellant.

J. T. McCaffrey [*C. I. Miller* of counsel], for the respondent.

PER CURIAM:

We do not think the verdict recovered by the plaintiff should stand. There have been two trials of the action. Upon a former trial the plaintiff recovered a verdict and on appeal the same was set aside and a new trial granted by reason of the confessedly perjured testimony of one Killen, a negro, a witness for the plaintiff. (171 App. Div. 972.)

Killen testified that Charles Matthews (referred to as "Whitey" Matthews), who was a steam shovel operator in defendant's employ and who was in charge of the operation of the shovel when it struck plaintiff, was at the time intoxicated, and the jury were permitted to find that the plaintiff's injuries were caused by the negligence of Matthews for whose acts defendant was responsible. After the trial, Killen was arrested for perjury and while in jail confessed that he had committed perjury in testifying that Matthews was intoxicated when plaintiff was injured. Defendant then moved for a new trial because of such perjured testimony. The motion was denied and on appeal to this court the order was reversed, the judgment set aside and a new trial granted upon the sole ground of the perjured testimony of Killen. Upon the last trial Killen was not sworn but plaintiff produced several witnesses who testified in relation to Matthews' intemperate habits, some of them swearing that he was intoxicated at the time of the accident.

Without discussing in detail the testimony of these witnesses, most of them sworn for the first time upon the trial here under review, it is sufficient to say that their testimony is so inherently improbable in the light of the circumstances as revealed by this record as to make it unworthy of credence. In this connection it is a significant fact that plaintiff, himself, who worked for Matthews from morning until the late afternoon of the day he was injured and who had every opportunity of observing the shovel operator's condition that day, positively disclaimed that he saw any indication of Matthews' intoxication or that he had ever seen him when he thought he was under the influence of liquor and that he had never heard of Matthews' intoxication at the time of the accident until he heard the testimony of his (plaintiff's) witnesses upon the prior trial.

On the day of the injury, Matthews was in charge of the steam shovel and plaintiff had drawn a large number of loads of gravel — probably fifty loads — of Matthews' loading, and was throughout the day in a position to observe and know the latter's condition, and his failure to observe any indication of intoxication to which some of the witnesses so willingly testified is most significant and gives birth to the suspicion that plaintiff's professed ignorance of Matthews' alleged intoxication was, perhaps, to avoid the imputation of an assumption of risk on his part which might defeat a recovery. The fact nevertheless remains, that plaintiff, if he is truthful, saw Matthews at least fifty times that day and never received the slightest intimation that the latter was otherwise than sober. Matthews was concededly an expert and experienced operator of steam shovels — as many of the witnesses say, one of the best in the business — and on the day in question loaded 400 loads of gravel without accident until the mishap to plaintiff. The steam shovel controlled by Matthews was a complicated machine requiring care and prudence in its operation. In lifting and discharging each shovel load of gravel, the operator was called upon to use four separate levers and a foot brake. No man in the maudlin condition claimed of Matthews by some of the plaintiff's witnesses could successfully load 400 loads of gravel in a day with this complicated machinery without accident.

App. Div.]

Fourth Department, May, 1917.

To meet plaintiff's testimony on the subject of Matthews' intoxication, defendant swore no less than fourteen apparently candid and disinterested witnesses, some of them engineers and employees in the State service, others teamsters and fellow-employees, all of them in a position to know, who gave testimony to the effect that Matthews was a sober, hard-working and extremely efficient workman and a successful and careful operator of the machine in his charge; that they never saw him drink or under the influence of intoxicating liquor.

We have no hesitation in expressing our opinion that not only does the testimony of these witnesses produced by the defendant overwhelmingly predominate over that offered by the plaintiff upon the vital question of Matthews' condition at the time the plaintiff was injured, but that we are called upon to set aside the verdict rendered on the trial herein as clearly against the weight of evidence.

The entire conduct of this case on the plaintiff's part, starting with the fraud perpetrated through the perjured testimony of Killen upon the first trial, followed by the production of the witnesses upon the second trial of a character and whose testimony is of a similar quality to that presented upon the first trial, is such as to compel grave doubt that plaintiff has a valid cause of action against defendant herein.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to the appellant to abide the event, upon questions of law and fact. The particular questions of fact upon which the reversal is made are stated in the *per curiam* opinion which is made a part of the order.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
R. F. STEVENS COMPANY, INC. (a Corporation), Appellant.

Second Department, May 11, 1917.

**Labor Law, section 8a, relating to work on Sunday, construed—
"factory"—establishment for pasteurizing and bottling milk.**

An establishment for the pasteurizing and bottling of milk is not a "factory" within the meaning of section 8a of article 2 of the Labor Law providing that "before operating on Sunday every employer shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday," etc.

The meaning of the word "factory" employed in section 8a of the Labor Law, is controlled by the definition contained in section 2, notwithstanding subdivision 2 (f) of section 8a added by Laws of 1914, chapter 388, providing that said section shall not apply to certain establishments including "milk bottling plants, where not more than seven persons are employed." Subdivision 2 (f), which appears on its face to limit the field of operation of the existing statute, cannot be held to have extended it.

It seems, that the exemptions were passed from excess of caution in view of the fact that some of the exempted industries would probably involve manufacture.

There must be some manufacturing in the establishment to bring it within the definition of a "factory" as that word is used in section 2 of the Labor Law.

APPEAL by the defendant, R. F. Stevens Company, Inc., from a judgment of the Municipal Term of the Court of Special Sessions of the City of New York, borough of Brooklyn, Part II, rendered against it on the 22d day of January, 1917, convicting it of violating section 8a of article 2 of the Labor Law, in operating a factory for pasteurizing and bottling milk on Sunday, in that it required one Daniel Callaghan to work in the pasteurizing department, without posting and filing a schedule, as provided in subdivision 3 of said section. (See Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 8a, added by Laws of 1913, chap. 740, as amd. by Laws of 1914, chaps. 388, 396, and Laws of 1915, chaps. 321, 357, 648.)

William B. Carswell, for the appellant.

Harry G. Anderson, Assistant District Attorney [Harry E. Lewis, District Attorney, with him on the brief], for the respondent.

BLACKMAR, J.:

The question presented is whether an establishment for pasteurizing and bottling milk is a factory as that term is used in section 8a of article 2 of the Labor Law. The case was tried on the admission of defendant that it did operate such establishment by requiring Callaghan to work in the pasteurizing department on Sunday without posting and filing the required schedule, and that more than seven employees were engaged in pasteurizing and bottling milk. If the establishment was a factory within the meaning of the section, the acts admitted constituted a crime. (*People v. Eberhart*, 171 App. Div. 458. See Penal Law, § 1275, as amd. by Laws of 1913, chap. 349.) The meaning of the word "factory," as defined in section 2 of the Labor Law, was considered in *Shannahan v. Empire Engineering Corp.* (204 N. Y. 543), in which Judge VANN wrote as follows: "A factory is a structure or plant where something is made or manufactured from raw or partly wrought materials into forms suitable for use. This is the primary definition which was extended by the statute so as to include any 'mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor.' The term 'business establishment' as thus used means one resembling a mill, workshop or other manufacturing establishment. It is confined to things of the same general character as those named. It does not mean all business establishments where one or more persons are employed at labor, but only those engaged to some extent at least in manufacturing of some kind."

It follows from this authoritative construction of the act that there must be some manufacturing in an establishment to bring it within the definition of a factory as that word is used in section 2 of the Labor Law. And so it was held in *O'Connor v. Webber* (163 App. Div. 175), and this construction of the definition was approved in the same case when it reached the Court of Appeals after a new trial (219 N. Y. 439).

The inquiry, then, recurs to the question whether pasteurizing and bottling milk is manufacturing. If it was not, the establishment in question was not a factory as defined in section 2 of the Labor Law (as amd. by Laws of 1915, chap. 650). This question was elaborately considered in

People ex rel. Empire State Dairy Co. v. Sohmer (218 N. Y. 199). It was there held, by a unanimous court, that such processes did not constitute manufacturing. It is true that the case concerned the taxing power, and not the regulation and safeguarding of labor; but the reasoning of the court is so cogent that it cannot be escaped. In the case last cited the process of pasteurizing was fully described, evidently on the evidence in the case. In the case at bar there is no evidence describing the process of pasteurizing, and as the burden rested on the People to establish that the premises was a factory, we would not be justified in disregarding the decision of the Court of Appeals without evidence showing that the process employed by the defendant rendered this decision inapplicable.

But the People claim that the meaning of the word "factory," employed in section 8a, is not controlled by the definition contained in section 2, because certain specified exemptions from the operation of the act operated by implication to enlarge the meaning of the word "factory" to cover the defendant's establishment. The clause relied on by the People is a portion of subdivision 2 of section 8a, which reads as follows:

"2. This section shall not apply to * * *

"(f) Employees in dairies, creameries, milk condensaries, milk powder factories, milk sugar factories, milk shipping stations, butter and cheese factories, ice cream manufacturing plants and milk bottling plants, where not more than seven persons are employed."

The reasoning is that such exemption would be an idle and useless legislative act unless such establishments are factories, and that, therefore, those employing more than seven persons are subject to the act. Now, if the exemption had been enacted originally as part of section 8a, the reasoning would have had some force. But that clause of exemption was not part of the act as originally passed. (See Laws of 1913, chap. 740.) The law, therefore, when it went into effect adopted the definition of a factory contained in section 2 as construed by the courts; and that was the unquestionable meaning of the term for the first year of the operation of the act. The clause containing the exemptions was inserted in the act a year afterwards. (Laws of 1914,

chap. 388.) It cannot be held that this clause which on its face appeared to limit the field of operation of the existing law, had the effect of extending it. No canon of interpretation requires this, especially when considering the effect of a penal enactment. We hold, rather, that the exemptions were passed from excess of caution, in view of the fact that some of the exempted industries would probably involve manufacture. It is also noted that, on this branch of the case, the whole of the People's argument rests on the use of the words "milk bottling plants" appearing in the clause of exemption in which the word "pasteurizing" is not used, and the laborer in question was employed in the pasteurizing department.

The judgment of conviction of the Municipal Term of the Court of Special Sessions is reversed, and the defendant discharged.

JENKS, P. J., THOMAS, STAPLETON and MILLS, JJ., concurred.

Judgment of conviction of the Municipal Term of the Court of Special Sessions reversed, and defendant discharged.

OSCAR FRIED, Respondent, *v.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant.

Second Department, May 18, 1917.

New trial — newly-discovered evidence — condition that plaintiff be allowed to read testimony of witness on prior trial — right of defendant to offer impeaching statements or affidavits without laying foundation therefor.

On a motion by the defendant in an action for personal injuries for a new trial on the ground of newly-discovered evidence, the court may impose as a condition that the plaintiff may read on the new trial the testimony given by one of its witnesses at the first trial. where such witness, now in a foreign State, has made an affidavit to the effect that he knowingly committed perjury on the first trial at the instigation of plaintiff's attorney, and is also under pressure of indictment procured by the defendant, by whom his family has been supported for several months; but the defendant, if the plaintiff reads such testimony, should be allowed to offer impeaching statements or affidavits without laying the foundation therefor by previous questions to the witness.

In this way the jury may hear the evidence as already given, together with the impeaching evidence, and so decide where the truth lies.

THOMAS, J., and JENES, P. J., dissented, with opinion.

APPEAL by the defendant, The New York, New Haven and Hartford Railroad Company, from that part of an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 9th day of February, 1917, amending two prior orders so as to grant defendant's motion for a new trial on the ground of newly-discovered evidence, which prescribes as a condition for the granting thereof the following provision, viz.: that plaintiff may read in and as evidence upon any trial of this case the testimony given by his witnesses at the last trial, and that if any witness whose testimony is so read to the jury shall hereafter testify to the contrary either upon a new trial or before any commissioner appointed to take his testimony in the case, then the jury shall be permitted to decide whether the testimony which said witness gave at the last trial was true or false.

James W. Carpenter [*Charles M. Sheafe, Jr.*, with him on the brief], for the appellant.

Thomas J. O'Neill [*Edgar T. Brackett* and *Leonard F. Fish* with him on the brief], for the respondent.

BLACKMAR, J.:

The serious question between the plaintiff and defendant is the liability of defendant to respond in damages for the serious injuries which the plaintiff suffered while in defendant's employ. To properly determine this question is the sole end and object of the action, and everything done by the court, all judgments and orders made, all appeals decided, must be solely directed to securing this result. For the present, questions of conduct of counsel, resting on charges and counter charges, must be subordinated to that end.

On the last trial, a witness, Berkery, gave important testimony tending to sustain plaintiff's cause of action, and plaintiff recovered a verdict for \$75,000 damages for the loss of both arms, amputated at the shoulders, as the result of burns from escaping electric fluid. After action by the court for

the reduction of the verdict to \$55,000, a motion was made for a new trial by the defendant, on the ground that it had discovered evidence tending to show that Berkery had committed perjury upon the trial on subornation of plaintiff's attorney. The motion was granted and an order so entered. On this motion and on another, made by plaintiff, to vacate this order, many affidavits were read. Among them was one by Berkery, deposing that he had knowingly committed perjury at the instigation of plaintiff's attorney. On the other hand, it appeared that Berkery was not only under pressure of an indictment procured by defendant, but that defendant, while Berkery was in jail, paid to his family \$12 a week for seven months, and, after he left jail, \$21 per week for nineteen months. It is a fair inference that this witness is now in the control of the defendant and out of the State, and his testimony is claimed to be essential to plaintiff's case, although upon this point we express no opinion. The defendant claims that plaintiff's judgment rested on the perjured testimony of this witness; on the other hand, the plaintiff claims that his testimony given at the trial was true and that the subsequent affidavit retracting it is perjury. On the one hand, it would be gross injustice that plaintiff's verdict should rest on perjury, and on the other no less an injustice would result if a just cause of action should be destroyed by defendant's acts. The witness Berkery is a venal and perjured witness; but the question is, which evidence is true, that given on the trial or in the retracting affidavits. After this court had affirmed the order granting a new trial and that denying a motion to set it aside (176 App. Div. 936), application was made to us to modify the order by inserting the conditions above stated. We denied this application, with leave to the plaintiff to apply for such relief to the justice who made the order. The application was made to the justice, who granted it and imposed the condition to the new trial that plaintiff might read upon the new trial, as evidence, the testimony given by his witnesses at the last trial. We have no doubt of the power of the court to impose such a condition upon granting the favor of a new trial to the defendant. For it was granted as a favor and not a right. Neither at Special Term nor in the Appellate Division has the court decided that

Berkery committed perjury at the trial. The extent of the decision was that the evidence that he had committed perjury was so strong that the case should be retried so that the value of his evidence could be tested by the jury, who alone were competent to pass on the facts, in the light of the evidence of his subsequent retraction. In the exercise of his discretion, the justice at Special Term, who was also the judge who tried the case, has determined that in view of the peculiar circumstances of the case justice requires that plaintiff be permitted to read the testimony given at the former trial. In this way the jury may hear the evidence as already given, together with the impeaching evidence, and decide where the truth lies. We see no reason why we should reverse the decision. Under certain circumstances, testimony of a witness on a former trial may be read in evidence on a new trial. (Code Civ. Proc. § 830.) This may be done as matter of right if the witness has died, become insane, being a non-resident has departed from the State, or has been rendered incompetent by operation of the provisions of section 829 of the Code. In this case the court, as a condition to granting a favor, extended the rule to the testimony of a witness who, since the first trial, has come under the pay and resulting control of the opposite party to the action. The favor granted by the court is not to the plaintiff in permitting him to use incompetent evidence, but to the defendant in granting a new trial. If the defendant accepts the new trial, it accepts the condition, and the evidence goes in by its consent. The appeal to us is to permit the defendant to accept the favor and reject the condition on which it is offered. We might have taken a very different view of the matter except for the fact that it is conceded that the defendant paid to Berkery's wife twelve dollars a week for seven months and twenty-one dollars a week for nineteen months, and that such payments ceased only on the very day after the motion which resulted in the order appealed from was made. But it is argued that it violates fundamental principles of judicial administration to permit testimony of a witness theretofore taken to be read in evidence while the witness, in an affidavit then existing, asserts its falsity. This argument seems to us to rest on the faulty assumption that the later testimony

of the witness is necessarily true. At the time the testimony was given the witness was in a court of justice and, in the presence of judge and jury, sworn, examined and subjected to cross-examination. When he made the retracting affidavits he was in the State of Pennsylvania, presumably in a private office, swearing before a notary public to an affidavit prepared by someone else. We know of no presumption that the later oath is the true one. It is a question for the jury which is true. If at the time of the new trial the witness were dead, or, being a non-resident, absent from the State, the testimony could be read no matter how many contradicting affidavits he had since made. As to the quality of the evidence, it makes no difference whether the conditions to its admission, prescribed in section 830 of the Code, or those present in this case and upon which the court acted, exist. And if, in cases provided for by the Code, to receive the evidence violates no fundamental principle of judicial administration, neither does it in this case. We think the Special Term has prescribed the only way in which the question can be passed on by the jury; but we think the order should be modified so as to confine the permission to the testimony of Berkery, and to permit the defendant, if the plaintiff reads it, to offer impeaching statements or affidavits without laying the foundation therefor by previous questions to the witness.

The order is modified in accordance with this opinion, and as modified affirmed, without costs.

STAPLETON and RICH, JJ., concurred; THOMAS, J., dissented in separate opinion, with whom JENKS, P. J., concurred.

THOMAS, J. (dissenting):

The plaintiff recovered a judgment of \$75,000, which was set aside upon motion based on the confession of two witnesses, that they had committed perjury on the trial. The order was absolute and was affirmed by this court. Thereafter the court at Special Term amended the order to permit the plaintiff to read the testimony of the witnesses, including Berkery, irrespective of their attendance upon the trial, and such order is now under review. The essential question is not whether the court has power under proper circumstances to make the reading of former testimony a

condition of a new trial, although this court considered that the new trial should be had in any event. The vice of the order lies in the inducement to making it. The court was not led to it because of some inconvenience to the plaintiff in procuring the attendance of Berkery, or because Berkery might be absent or incapacitated, or because his mind might have weakened, or his memory waned, or his speech become faltering, or his powers abated, or because he was less presentable in any wise. Nor was the reason simply that Berkery had become hostile to plaintiff, as he has, and might begrudge the testimony or impede the elicitation of it. In such case the examiner may confront a witness with his former testimony to break down resistance and to force the memory, and to that end the court will be tolerant. The sole purpose in allowing Berkery's former testimony to be read was, that the court knew or conceived or apprehended that it was no longer his testimony — no longer the testimony that he would give, and that at a point where his affirmance of a fact was vital, he would deny that it existed. The underlying reason for allowing the former testimony of a witness to be substituted for his present sworn statement is, that it is what the witness would say orally, and so the statute has set forth the instances where it is permitted. Berkery's testimony is to be read because the plaintiff knows, or fears, that, in an essential particular, it is precisely opposite to what Berkery in person would say. It is known that Berkery now affirms under oath that his former testimony was in part willfully false, and because he has so declared under oath, and another had similarly stated as to his own testimony, the new trial was granted in the interest of justice. But the very testimony that Berkery says is not true but corrupt, that he disclaims as his testimony, at which he revolts, of which he is theoretically penitent, is to be received as his own genuine, moral and legal testimony, although he protests it. And on it a verdict is to be allowed to rest. So the testimony, that was so accused that the court challenged a verdict supported by it, may be read to impel another verdict, although the person who gave it says that it is the product of a violated oath, that it betrays the truth and is the converse of his knowledge, memory and moral sense. But it may be answered

that Berkery has no moral sense, and in that I agree. And in that view the proposal is to allow the plaintiff to read the former testimony, because Berkery's moral nature does not permit him to tell the truth. The argument is, as I understand, that at the last trial he may have had a truth-telling capacity that lends worth to his former testimony, but that defendant corrupted it by bribes. So, having set aside the verdict at least in suspicion of the earlier moral quality, the proposal is to let the jury decide whether his former declaration under oath, albeit denounced by the declarant, is what he knows and believes to be true, or whether his denial of it on this trial is a sincere revelation of his knowledge, and in determining that issue his intermediate statements may be considered, together, I assume, with the bribes. If the jury shall determine that Berkery told the truth on the first trial, his testimony there shall be adopted by them as his testimony for the purposes of this trial. He, perchance, says: "It was then I committed perjury." The jury may say: "No, it is now that you commit it." If he should say: "This testimony now given is my present real testimony," the jury may say: "No, that read to us is your present unalloyed testimony." So a witness' former declarations become his testimony, struggle against and denounce it as he may. In that way the perjurer becomes a pure fountain of truth. In vain he cries out that he was a perjurer. The jury had read his heart and fitted words to his lips, so that speaking in the present he is made to speak as in the past, and what he said in the past become his words in the present, although he would have none of them. So a full well and living witness in attendance on court is made on his oath to say that something is true that at the same time on his oath he says is not true, that on it a jury may hang a verdict. Even a perjurer and bribe-taker should not be enforced to swear to what is not his immediate testimony and to have what he avows are perjuries coined into his approval. That would be fabrication. It were far better to sweep aside the corrupt and corrupted Berkery, to commend him to the proper district attorney, to declare our utter condemnation that great sums of money have been paid him or held as lure before him, better to cleanse this case of the

tainting elements that infect it and stain the administration of justice, and thereby restore the case to usual and healthful channels. The plaintiff, even mutilated as he is, should not be allowed to deform the law. Let him take the usual chance that the law affords. There could not be a more marked instance of ignoring the principle on which the introduction of former testimony rests, or the misuse of the declarations of a witness, not a party to the action. The Code of Civil Procedure (§ 830) authorizes to be read in evidence the testimony of a witness, who has died, or who, being a non-resident, has departed from the State, or become insane, or incompetent. Happily, in such instances, the present situation is impossible. But the testimony of Berkery, alive, sane and competent, by the order, may be read to his face, while he rejects it, and he cannot escape the ownership of it, nor even the recurring perjury of it, if the jury choose to fasten it upon him unwilling. Something so strange as that seldom, if ever, has been seen in a court of justice — a man testifying as a two-fold witness at the same trial, now in his proper person, now through former declarations; his word set against his word; his oath disputing and dishonoring his oath, and thereupon a jury, by some mystery of fathoming, selecting the truth of which it deems the duplex witness conscious. It even surpasses a paradox. I am opposed to such process for racking off perjuries and ascribing to the filtrate probative value, and above all to entering on the record that it is the man's testimony, although it must be known, if he dispute it, that it is not. A man's shadow may be in obscure semblance of himself, but what a man, not a party, has uttered in the past, should not be recorded as something that he is presently saying, while, under a new oath taken, he then and there brands it as infamous.

The order should be modified so as to permit testimony to be read in case the witnesses are not in attendance at the court.

JENKS, P. J., concurred.

Order modified in accordance with opinion by BLACKMAR, J., and as modified affirmed, without costs. Order to be settled before Mr. Justice BLACKMAR.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of THERESA LINDQUEST, Respondent, for Compensation to Herself and Child under the Workmen's Compensation Law, for the Death of ANDREW LINDQUEST, Her Husband, v. JOHN HOLLER and STANLEY SHEPARD, Copartners, Doing Business under the Firm Name and Style of HOLLER & SHEPARD, Employers, and ROYAL INDEMNITY COMPANY, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — admissibility of hearsay evidence as to accidental injury — evidence as to death of superintendent of construction on barge canal, resulting from peritonitis caused by fall — presumption.

Hearsay evidence as to whether or not a decedent had suffered an accidental injury sufficient to warrant an award under the Workmen's Compensation Law is admissible in the discretion of the State Industrial Commission. Where the death of a superintendent of construction of a section of the barge canal resulted from acute peritonitis, which might have been caused by the rupture of the appendix, and there was no eye witness of the happening of the alleged accident, and it was not confirmed by any marks upon the skin or by other external sign, and the sole evidence of its occurrence was found in the employer's first report of the injury and in the hearsay evidence of the wife, son and attending physician of the deceased that he said that his foot slipped while he was attempting to climb out of the prism of the canal, and that he fell down the bank, striking his abdomen, causing severe pain, and that he told his wife that "something broke inside," the State Industrial Commission was justified in finding that the deceased sustained an accidental injury sufficient to warrant the making of an award.

The presumption created by section 21 of the Workmen's Compensation Law was not overcome by substantial evidence.

APPEAL by John Holler and others from an award of the State Industrial Commission made on the 26th day of October, 1916.

Frank J. O' Neill [Barnett Cohen of counsel], for the appellants.

Egburt E. Woodbury, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], and *Robert W. Bonyng*, counsel to the Commission, for the respondents.

LYON, J.:

The most important question presented by this appeal is whether hearsay evidence as to the deceased having suffered an accidental injury was sufficient to warrant the State Industrial Commission in making an award.

The deceased was the superintendent of construction of a section of the barge canal, and concededly his death resulted from acute peritonitis which might have been caused by the rupture of the appendix.

There was no eye witness of the happening of the alleged accident, and it was not confirmed by any marks upon the skin or by other external sign.

The sole evidence of its occurrence is found in the employer's first report of injury, and in the testimony of the wife, son and attending physician of the deceased that he said his foot slipped while he was attempting to climb out of the prism of the canal, and that he fell down the bank, striking his abdomen, causing severe pain, and that he told his wife "he broke something inside." The employer's report also stated positively that the accident happened on the barge canal location May 9, 1916, at ten A. M. while the deceased was climbing out of the prism of the barge canal.

The State Industrial Commission found the facts to be in accordance with such statement of the deceased, which was stated by the medical expert of the Commission to be the most plausible theory from a clinical point of view considering the case *in toto* and the rapid development of the symptoms and physical signs after the alleged fall; that at the time of the happening of the accident the deceased was afflicted with a diseased appendix, and that by reason of the fall, acute exacerbation of the appendix resulted producing a rupture of the appendix from which acute peritonitis developed, causing death five days after the fall. No autopsy was had, and whether the peritonitis in fact resulted from a rupture of the appendix or from some other cause was not definitely proven. It is not claimed that the mere fact that death occurred from peritonitis would of itself be sufficient evidence that the deceased had sustained an accidental injury to warrant making the award, but we think the conclusions of the Commission were warranted provided the Commission was justified

App. Div.]

Third Department, May, 1917.

in receiving the hearsay evidence and basing its conclusions thereon. Consideration of the appeal is, therefore, narrowed to the single question as to the admissibility of the hearsay evidence, which was received under the objection of the appellants.

I think that under the decision in the case of *Matter of Carroll v. Knickerbocker Ice Co.* (218 N. Y. 435) the hearsay evidence was admissible in the discretion of the State Industrial Commission and hence was properly received.

There was not in this case as in the *Carroll* case denials of the happening of the accident by persons who were present at the time it was claimed to have occurred, nor is the evidence in this case abhorrent to reason and common sense as in that case, and it cannot be said in this case as in that case that the presumption created by section 21 of the Workmen's Compensation Law was overcome by substantial evidence.

The State Industrial Commission was satisfied as to the credibility of the hearsay evidence. It was, therefore, confronted by questions of fact and its decision thereon being supported by the evidence is conclusive upon us.

The award of the Commission should be affirmed.

Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ROBERT THOMPSON, Respondent, for Compensation under the Workmen's Compensation Law, v. SHERWOOD SHOE COMPANY, Employer, and AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — amputation of one-fourth of an inch of tip of one finger not the loss of one-half thereof.

The loss by amputation of approximately one-fourth of an inch of the tip of one of a claimant's forefingers, no claim being made of any further injury to the finger, does not constitute the loss of the first phalange so as to warrant an award for the loss of one-half the finger.

APPEAL by the defendants, Sherwood Shoe Company and another, from an award of the State Industrial Commission, entered in the Albany office of said Commission on the 9th day of November, 1916.

Jeremiah F. Connor, for the appellants.

Robert Thompson, for the claimant, respondent.

Egburt E. Woodbury, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], and *Robert W. Bonyng*, counsel to Commission, for the respondent State Industrial Commission.

LYON, J.:

In July, 1916, the claimant suffered the loss by amputation of approximately one-fourth of an inch of the tip of one of his forefingers. No claim is made of any further injury to the finger. The X-ray photograph contained in the record indicates that the entire bulbous terminal of the tip of the finger was not taken off. The attending physician described the treatment: "Pieces of bone removed, wound closed, antiseptic dressings applied." The claimant stated in answer to the question, "Will you be able to take up regular employment when you return to work?" "Yes, but will not be able to accomplish as much as before accident." The State Industrial Commission holding that the injury constituted the loss of the first phalange of the finger made an award of twenty-three weeks' compensation which was the full statutory award for the loss of one-half the finger. The employer and insurance carrier have appealed, claiming that the loss of so small a portion of the finger did not constitute the loss of substantially all the phalange, and hence that the award was not warranted. In this we think the appellants are correct.

In the case of *Geiger v. Gotham Can Co.* (177 App. Div. 29) we held, discussing authorities bearing upon the question, that the amputation of one-eighth of an inch of the tip of a finger did not entitle the claimant to be awarded compensation for the loss of the entire first phalange. We do not think the loss of an additional one-eighth of an inch of the tip of a finger with the result shown in the case at bar in any way alters the legal principle, and hence that the award should be set

aside and the claim remitted to the Commission for further consideration. It may be observed that while the findings of the Commission state the injury as having occurred to the forefinger of the right hand, the statements of the claimant, employer and attending physician state that the injury was to the forefinger of the left hand, a clerical error undoubtedly on the record.

The award should be reversed and the claim remitted to the Commission for further consideration.

All concurred.

Award reversed and matter remitted to the Commission for further consideration.

In the Matter of the Application of the ATTORNEY-GENERAL, Respondent, for a Writ of Mandamus, Addressed to JACOB TAUBENHEIMER, as Supervisor of the Town of Bellmont, Appellant.

Third Department, May 2, 1917.

Conservation Law — levy and collection of moneys expended by Conservation Commission in fighting fires — mandamus to compel supervisor to pay over such moneys to Conservation Commission — constitutional law — parties entitled to raise constitutional question.

Where a board of supervisors proceeding under the Conservation Law has levied the sum claimed by the Conservation Commission to be due from the town for the expenditures made by the Commission in fighting fires in said town, and such money has been duly collected and paid over to the supervisor, he may be compelled by a writ of peremptory mandamus, issued on the application of the Attorney-General, to pay over such moneys to the Conservation Commission.

A constitutional question may be raised only by a person whose rights are involved.

The supervisor being a mere custodian of moneys raised in regular form for a particular purpose, has no authority to question the propriety or the legality of the expenditures underlying the levy and collection of the taxes.

Questions as to the liability of the town for expenditures made by the Conservation Commission in fighting fires should have been raised in connection with the assessment and levy of the tax.

APPEAL by Jacob Taubenheimer, as supervisor, from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Franklin on the 5th day of January, 1917, directing the issuance of a peremptory writ of mandamus against him and also from the writ issued pursuant to said order.

Kellas & Kellas [John P. Kellas of counsel], for the appellant.

Egburt E. Woodbury, Attorney-General [James Gibson, Jr., Deputy Attorney-General, of counsel], for the respondent.

WOODWARD, J.:

Acting under the provisions of the Conservation Law, the Attorney-General has applied for and caused to be issued a peremptory writ of mandamus, commanding Jacob Taubenheimer, as supervisor of the town of Bellmont, to pay over to the Conservation Commission of the State of New York the sum of \$1,642.40. (See Consol. Laws, chap. 65 [Laws of 1911, chap. 647], § 9, as amd. by Laws of 1912, chap. 444, and Laws of 1915, chap. 318; Id. § 50, subd. 11, ¶ (b), as added by Laws of 1916, chap. 451.) Jacob Taubenheimer, as such supervisor, appeals from the order.

There appears to be no question that the proceeding is in all respects in harmony with the requirements of the Conservation Law, and there is no reason why the writ should not be sustained, unless there is some constitutional defect in the statute. The appellant suggests various provisions of the statute and Constitution which he claims have been violated, but we are of the opinion that he has no standing to raise these questions. Proceeding under the statute the board of supervisors levied the sum claimed by the Conservation Commission to be due from the town of Bellmont upon the property of that town. This sum was duly collected in the regular course and was paid over to the supervisor, whose duty it was, under the law, to pay over the same to the Conservation Commission. (See Conservation Law, § 94, added by Laws of 1912, chap. 444, as amd. by Laws of 1913, chap. 723; now Conservation Law, § 53, as added by Laws of 1916, chap. 451. See, also, Town Law [Consol. Laws, chap. 62; Laws of 1909,

chap. 63], § 98, subd. 1, as amd. by Laws of 1914, chap. 153.) The sum has been demanded and the supervisor retains the same, and he is now commanded to pay the same over to the Conservation Commission. And why not? He has no claim upon the money individually. While there may have been some ground on which a taxpayer might have resisted the payment of the tax, the tax having been paid without protest on the part of any taxpayer, so far as appears, we know of no law which permits the supervisor, in custody of the fund, to raise the question. It is fundamental that a constitutional question may be raised only by a person whose rights are involved, and there is nothing before us to show that any possible right of Jacob Taubenheimer, as supervisor, is involved in this proceeding. He is the mere custodian of moneys raised in regular form for a particular purpose, and he has no authority whatever to question the propriety or the legality of the expenditures underlying this levy and collection of taxes, as he is seeking to do. The office of supervisor is an important one, but it is governed by statute, and, until the law makes some provision for a supervisor to become the general guardian of the taxpayers of his township, we see no justification for this appeal. If any question was to be raised as to the liability of the town for the expenditures made by the Conservation Commission, in fighting fires in that township, they should have been raised in connection with the assessment and levy of the tax, and not by the supervisor after the moneys have been paid to him under the provisions of the statute.

The order appealed from should be affirmed, with costs.

Order unanimously affirmed, with ten dollars costs and disbursements.

Before STATE INDUSTRIAL COMMISSION.

In the Matter of the Claim of DELIA B. AMES for Compensation to Herself and to WILLIAM AMES, JR., and Others, Dependent Children, for the Death of Her Husband, WILLIAM AMES, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer.

Third Department, May 2, 1917.

Workmen's Compensation Law — where **engineman struck by train while going to collect his wages after completing his day's work not injured in course of his employment — injuries while walking along track in violation of Railroad Law, section 83.**

Where a yard engineman, after turning in his engine and his slip showing that his run had been completed, although there were plenty of streets by which he could have left the railroad yard for the purpose of going home, walked along the tracks for a distance, crossed over another public highway which he had gained in safety and then entered on the right of way of an elevated railroad conducted by his employer, for the purpose of catching a passing freight train in order to arrive at a certain place to collect his pay, and was struck and killed by such train, the injuries resulting in his death cannot be held to have arisen out of and in the course of his employment within the meaning of the Workmen's Compensation Law.

But there may be cases in which an employee in going for his wages may be considered as acting in the course of his employment.

As the decedent was not employed on the line where the accident happened, he was a mere trespasser at that point, violating the spirit if not the letter of section 83 of the Railroad Law (Laws of 1910, chap. 481).

CERTIFICATION by the State Industrial Commission to the Appellate Division, Third Department, of a question pursuant to the provisions of the Workmen's Compensation Law. (See Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 23, as amd. by Laws of 1916, chap. 622.)

Egburt E. Woodbury, Attorney-General, and Robert W. Bonynge, counsel for State Industrial Commission, for State Industrial Commission.

Daniel J. Dugan [Isadore Bookstein with him on the brief], for the claimants.

O. G. Browne and Visscher, Whalen & Austin [Sherman A. Murphy of counsel], for the employer.

App. Div.]

Third Department, May, 1917.

WOODWARD, J.:

The State Industrial Commission has certified the question: "Did the injuries which resulted in the death of William Ames arise out of and in the course of his employment with the New York Central Railroad Company within the meaning of the Workmen's Compensation Law?"

The facts found by the Commission are to the effect that on the 8th day of March, 1915, the day when William Ames received the injuries which resulted in his death, he resided in Albany, and was employed as a yard engineman by the New York Central Railroad Company; that on said day, at about six o'clock in the morning, the said William Ames had turned in his engine, having completed his work, and had also turned in his slip showing that his run had been completed. His engine was left by him in the freight yard about 100 feet from the public street, namely, Spencer street. There were plenty of streets by which Ames could have left the yard for the purpose of going home, but, instead of making use of one of these highways, he walked along the tracks for a distance of 1,000 feet and crossed over another street and on to the tracks on the other side of the last-mentioned street, and was there struck and killed by a passing freight train. The purpose of Ames in going upon this second track, which appears to have been an elevated track of the New York Central lines, was supposed to be for the purpose of catching a passing freight train in order to board the same and ride to West Albany, where he could collect his pay. Ames, as the Commission certify the facts, had no authority from his employer to be at the place where the accident occurred and was not at that place on any business in behalf of his employer, but was there for purposes of his own.

We think the question must be answered in the negative. While there might be cases in which an employee in going for his wages would be considered as acting in the course of his employment, we think this is not such a case. Ames had closed his day's work and had left the premises of his employer; he had gained a public highway in safety, and then he climbed up some steps and gained entrance to the right of way of an elevated railroad conducted by the same company which employed him in the yards, which appear to

have been at grade, and was struck by a Boston and Albany train, which makes use of this elevated track. He was employed by the New York Central Railroad Company, but his employment was not upon the line where the accident happened; he was a mere trespasser at the point where the accident happened, violating the spirit if not the letter of section 83 of the Railroad Law (Consol. Laws, chap. 49; Laws of 1910, chap. 481), and there is no justification for holding the insurance carrier liable for such an accident. He was not engaged in a hazardous employment for the employer; he was making use of the tracks of the New York Central railroad for a purpose for which they were not intended, and the loss must fall upon those who were dependent upon him. (*Matter of De Voe v. New York State Railways*, 169 App. Div. 472, 476; *affd.*, 218 N. Y. 318, 320; *Matter of Glatz v. Stumpp*, 220 id. 71, 74.)

The question is answered in the negative.

All concurred.

Question certified answered in the negative.

AUGUSTUS MAYER, Appellant, v. ARTHUR CHAMBERLAIN,
Respondent.

Third Department, May 2, 1917.

Libel — when letter by principal of high school to State Department of Education referring to president of board of education not libelous — pleading — statement inconsistent with facts alleged — affirmative allegation of previous denial adds nothing to pleading — affirmative defense — allegation as to truth or justification or mitigation — burden of proof — instructions to jury.

A letter written by the principal of a high school to the State Department of Education containing some uncomplimentary suggestions to the president of the board of education, but of such character as to be privileged and not bearing upon its face evidence of malice, is not libelous in the absence of evidence of malice.

Where, in an action for libel based on said letter, the defendant admits writing the letter, but denies that the same was written maliciously or that the matters therein contained were false, and alleges on information

App. Div.]

Third Department, May, 1917.

and belief that the statements in the letter are and were true, the latter allegation not being pleaded as a defense, but having been introduced as an affirmative of the previous denial that "the same was written maliciously or that the matters therein contained were false" adds nothing to the pleading as an answer.

The allegations of a complaint are controverted or put in issue only by a general or specific denial.

The material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged or from which a general denial may be implied or inferred.

As the plaintiff alleged that the matters contained in the defendant's letter were maliciously composed and circulated, and that the letter contained "false, defamatory and libelous matter," and the material matters of malice and of falsehood were denied by the defendant, the burden of proof was upon the plaintiff.

Since the issue of the alleged falseness of the letter was raised by the allegations of the complaint and the denials of the answer, and did not depend upon any affirmative defense, the court properly refused "to charge in this connection that where the defendant pleads the truth or justification or mitigation, the burden is on the defendant as to those matters."

APPEAL by the plaintiff, Augustus Mayer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Sullivan on the 25th day of September, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on or about the same day denying plaintiff's motion for a new trial made upon the minutes.

Henry F. Gardner [*John D. Lyons* with him on the brief], for the appellant.

Guernsey T. Cross [*Ellsworth Baker* with him on the brief], for the respondent.

WOODWARD, J.:

The complaint alleges that the plaintiff and defendant are both residents of Callicoon; that the plaintiff is a physician, practicing his profession in said town, and that he is president of the board of education of Callicoon union school, "and was of good name, fame and credit as such;" that the defendant on or about the 17th day of February, 1916, "maliciously composed, or caused to be composed, and maliciously circulated or caused to be circulated, a certain article of and

concerning the plaintiff herein, which article contained false, defamatory and libelous matter," setting out a letter written by the defendant, principal of the Callicoon high school, addressed to Dr. Charles F. Wheelock, of the Education Department at Albany, making explanations in reference to certain school matters, evidently in response to a letter from Dr. Wheelock. This letter contained some suggestions uncomplimentary to the plaintiff, but it is entirely evident that it was of such a character as to be privileged, and it does not bear upon its face evidences of malice; it is rather a mildly drawn complaint of the plaintiff in his relations to the school, and in the absence of evidence of malice it is not libelous. (*Mellen v. Athens Hotel Co.*, 153 App. Div. 891, and authority there cited.)

The answer admits all of the first allegation, except the allegation that the plaintiff was of good name, fame and credit, which he denied; admits writing the letter set out in the complaint, but denies that the same was written maliciously, or that the matters therein contained were false; denies the remaining allegations of the complaint as to the intent with which the matter was published, and that the facts alleged were wholly false, and alleges, on information and belief, that the allegations contained in the letter mentioned and set forth in the complaint are and were true. This latter allegation is not pleaded as a defense; it seems to have been introduced as an affirmative of the previous denial that "the same was written maliciously, or that the matters therein contained were false," and adds nothing to the pleading as an answer. The allegations of a complaint are controverted or put in issue only by a general or specific denial. A material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged, or from which a general denial may be implied or inferred. (*Smith v. Coe*, 170 N. Y. 162, 167, and authorities there cited.) If there had been no denial of the essential allegation of the complaint, this affirmative allegation would not have raised the issue, and it was, therefore, mere surplusage. The defendant then, further answering, sets out the circumstances under which the letter was written, claiming that the same was privileged under the circumstances disclosed, and alleges that the same

App. Div.]

Third Department, May, 1917.

was not published, except as it was sealed, and sent to the Department of Education. While this is not denominated a defense, it is of that character, and no question was raised as to the form of the pleading. The answer then alleges in mitigation of damages that the defendant believed the matters set forth in the letter were true; that he had heard the plaintiff use profane and vulgar language, etc., and demands that the complaint be dismissed.

The case was tried upon the issues made by the denials and the question of privilege, and the only question that survives the verdict of no cause of action, rendered by the jury is an alleged error in the charge of the court, or rather in the neglect of the court to charge as requested by the plaintiff. The learned court did not tell the jury that the letter was privileged, and that this privilege might be destroyed by a malicious intent upon the part of the writer. The jury were told about a privileged communication, but just what effect malice on the part of the writer would have was not disclosed, and the court finally submitted to the jury the question whether the statements were true or false, saying: "And whether they are true or false will depend upon the evidence, of course, in the case. The burden is upon the plaintiff to show to your satisfaction by a preponderance of evidence, the greater weight of the evidence, that he has been injuriously affected by the statements which have been made; that the statements are not true; that being false he has been affected by his reputation being injured."

Counsel for the plaintiff excepted "to that part of your charge where you state to the jury that the burden is upon the plaintiff in this case, and I ask you to charge in that connection that where the defendant pleads the truth or justification or mitigation, the burden is on the defendant as to those matters." To this the court made no response, and counsel took an exception to the silence of the court; and this presents the only question upon this appeal. The plaintiff had alleged that the matters contained in the defendant's letter were maliciously composed, maliciously circulated, and that the letter "contained false, defamatory and libellous matter." The material matters of malice and of falsehood were denied by the defendant, and there can be no question

that the "burden is upon the plaintiff in this case." The burden is always upon the plaintiff to establish the facts which are necessary to his cause of action. (*Stokes v. Stokes*, 155 N. Y. 581, 586.) The charge was not, therefore, open to the objection made by the plaintiff's counsel, and it only remains to be seen whether the court was called upon to give the instructions asked for by the plaintiff. The objection was to the part "of your charge where you state to the jury that the burden is upon the plaintiff in this case," and then the court is asked "to charge in that connection that where the defendant pleads the truth or justification or mitigation, the burden is on the defendant as to those matters." While there may be some justification for the abstract proposition, for one who sets up an affirmative defense is, as to such defense, charged with the burden of proof (*Stokes v. Stokes, supra*), if the case hinges upon the defense, the case here under consideration, and as submitted to the jury, did not depend upon any affirmative defense. The issue of the alleged falseness of the letter was raised by the allegations of the complaint and the denials of the answer—the abstract allegation of the truth of the allegations was not properly in the case, for it raised no issue. The issue tendered, and the one submitted to the jury, was whether the statements were true or false, and as to that issue the burden was unquestionably upon the plaintiff. No objection was made to the submission of this issue, or to the instructions of the court in the matter, except the objection to the instruction that the burden of proof was upon the plaintiff in this case, and if the only issue to go to the jury was as to the truth or falsity of the statements, this instruction was clearly right. The real question which might have been raised, whether there was evidence of malice, does not seem to have occurred to any one, and as the charge, to which no other exception was taken, became the law of the case, it cannot be held that the court erred to the prejudice of the plaintiff in refusing the modification suggested.

The judgment and order appealed from should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

JAMES BRONNIE, Appellant, v. NEW ENGLAND EQUITABLE INSURANCE COMPANY, Respondent, Impleaded with THE KENDAR ENGINEERING AND CONSTRUCTION COMPANY, INC., Defendant.

Third Department, May 2, 1917.

Canal Law, section 145, construed — action by laborer on bond of contractor — time of commencement of action.

The provision of section 145 of the Canal Law, requiring a contractor's bond that the contractor shall pay "at least once each month," is for the benefit of the laborer, and the provision that "no action shall be maintained against the sureties unless brought within thirty days after the completion of the labor" is for the benefit of the surety, and such provisions must be construed and harmonized with reference to the manifest purpose of each.

Although a laborer may maintain an action once in each month for his compensation, he is not required to do so. All that a surety can require is that the action shall be instituted within thirty days after the completion of the labor.

APPEAL by the plaintiff, James Bronnie, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of Saratoga on the 2d day of February, 1917, upon the verdict of a jury rendered by direction of the court.

Moore & McGinity [Edward C. McGinity of counsel], for the appellant.

James J. Cuff, for the respondent.

COCHRANE, J.:

The respondent is a surety on a bond given by a contractor for certain work on the State canal. The bond was given pursuant to section 145 of the Canal Law (Consol. Laws, chap. 5; Laws of 1909, chap. 13), which, so far as material, is as follows: "The Superintendent of Public Works or assistant superintendent having charge, shall also require and take from the contractor, a bond with at least two good and sufficient sureties, conditioned that such contractor will well and truly pay in full, at least once in each month, all

laborers employed by him on the work specified in such contract. * * * Actions may be brought for a breach of such bond by any laborer not paid in accordance with its terms. * * * No action shall be maintained against the sureties unless brought within thirty days after the completion of the labor, the payment of which is secured by the bond."

The principal in the bond assigned his contract to the Kendar Engineering and Construction Company, Inc. The plaintiff performed labor for the latter company in the performance of said contract. The company defaulted in the payment of its obligation to the plaintiff for such labor. The plaintiff brings this action on the said bond. The labor was performed between the 1st day of February, 1916, and the 8th day of March, 1916, amounting to \$143.75 and was completed on the latter day. This action was commenced April 3, 1916. The learned trial justice held that the plaintiff could only recover for the labor performed during the month of March.

We are unable to adopt the views of the trial court. The scheme and purpose of the statute are obvious. The provision that the contractor shall pay "at least once in each month" is for the benefit of the laborer. The provision that "no action shall be maintained against the sureties unless brought within thirty days after the completion of the labor" is for the benefit of the surety. It is a short Statute of Limitations in his favor. The two provisions must be construed and harmonized with reference to the manifest purpose of each. The laborer may maintain an action once in each month for his compensation but he is not required to do so. The statute does not intend that he must disrupt his relations with his employer under penalty of losing his security for his labor unless he does so. He may if he sees fit allow compensation for his labor to accumulate from month to month and then bring an action for the full amount unpaid. All that the surety can require is that the action shall be instituted within thirty days after the completion of the labor. Thirty days after the final completion of the labor the surety is immune from action. Thus the rights of both parties are safeguarded and the statute is given a reasonable and just construction. The construction given by the trial justice is

App. Div.]

Third Department, May, 1917.

unduly oppressive to the laborer and might work out to the manifest disadvantage of both parties.

In the case of *Hubbard v. Rodger* (75 Hun, 220) it was decided that the statute contemplated that the action must be commenced within thirty days after the completion of the labor for which compensation was sought and not thirty days after the completion of the entire contract. That case is not an authority for this respondent.

The judgment should be reversed, with costs, and judgment directed in favor of the plaintiff for \$143.75 and interest from March 8, 1916, and costs.

All concurred.

Judgment reversed with costs, and judgment directed in favor of the plaintiff for \$143.75 and interest from March 8, 1916, and costs.

GEORGE W. GROVES, Appellant, v. GUY S. WARREN,
Respondent.

Third Department, May 2, 1917.

**Sale — intent that payment and delivery be concurrent acts —
agreement to resell merchandise — conversion.**

Where the purchaser of a stock of shoes, rubbers, etc., agreed to place them on sale in the store of the vendor, to pay the clerk hire and advertising expense thereof, and that the vendor should be at liberty to participate in such sale and should have the proceeds thereof from day to day until the purchase price was paid, and the vendor after receiving the greater part of the purchase price due him removed the remainder of the stock, valued at nearly four times the balance due, and excluded the purchaser from the possession thereof, the latter is not entitled to maintain an action for conversion, because title had not vested in him, the intent being that delivery and payment should be concurrent. The rights of the parties rested in contract.

KELLOGG, P. J., and WOODWARD, J., dissented, with opinion.

APPEAL by the plaintiff, George W. Groves, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Tioga on the 6th day of October, 1916, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

On December 10, 1915, the plaintiff as party of the first part made a written contract with the defendant as party of the second part to said contract. The defendant was a retail shoe merchant in Waverly, N. Y. The contract contained the following provisions: "Party of first part agrees to and by this contract does purchase of party of second part, a certain stock of shoes and rubbers, etc., (not including fixtures) at inventory or cost from manufacturers or jobbers to second party, less thirty per cent of said inventory or cost price, except a certain specified few pairs of shoes and rubbers, a list and inventory of which is attached hereto, and party of second part shall receive inventory or cost for these few pairs, being stock purchased by second party during last part of 30 days. Party of first part agrees to put on sale of above mentioned stock in the store of second party at 304 Broad St., and party of second part agrees to take his pay in the following manner: At the close of each day's sale, parties of first and second part shall count up and check the cash taken in during the day and party of second part shall keep such cash until he shall have received the amount due him on this contract and in case sales of entire stock should not equal purchase price of stock, party of first part agrees to make up said difference at close of sale. Party of first part agrees to pay the clerk hire and advertising expense of conducting the sale, such expenses to start from the time the inventory is completed. Party of second part by this agrees to give his services without charge, until his claims are satisfied and he shall have received all his money due him under this contract and also to give possession of store without charge until the end of sale. Inventory of few pairs is mentioned in contract by mutual consent estimated at (\$400) Four Hundred and list not necessary." The remainder of the contract does not at present appear to be material.

The parties immediately took an inventory and it is conceded that the inventoried value of the property was about \$5,900. The purchase price to the defendant, therefore, under the arrangement above indicated was \$4,250.

Immediately after the inventory was taken the plaintiff advertised a sale of the property at retail to the public as contemplated by the contract, and proceeded with such

App. Div.]

Third Department, May, 1917.

sale. The first three days the sales amounted to \$2,500 which amount was turned over to the defendant. Then the plaintiff discharged some clerks and the sales dwindled until February 28, 1916, at which time the total sales had increased a little more than \$1,000 in excess of the first three days. The last week they do not appear to have averaged much more than \$10 a day. In the correspondence which preceded the contract plaintiff had expressed the opinion that defendant would receive his purchase price within a week. On February 28, 1916, the defendant removed the remaining stock of goods from the store and excluded plaintiff from the possession thereof. At that time the defendant had received on account of the purchase price due him from the plaintiff about \$3,600, leaving unpaid about \$650. The inventoried value of the property taken by him February twenty-eighth was over \$2,400.

This action is brought for a conversion. At the close of the plaintiff's evidence the court dismissed the complaint for the reason that the plaintiff had neither title to the property nor possession thereof.

Lynch & Clifford [F. W. Clifford of counsel], for the appellant.

Frederick E. Hawkes, for the respondent.

COCHRANE, J.:

The contract was executory and title to the property had not vested in the plaintiff. Although the contract uses the words "party of first part agrees to and by this contract does purchase of party of second part," that language does not necessarily import an executed contract but must be construed in connection with the rest of the contract taken as a whole and such construction placed thereon as is required by the entire instrument. (*Anderson v. Read*, 106 N. Y. 333, 344.)

In *Empire State Type Founding Company v. Grant* (114 N. Y. 40) it was said: "It is too well settled to require the citation of authority, that where a sale of personal property is made upon condition that the stipulated price shall be paid upon delivery, title does not pass until payment made, unless the vendor waive the condition."

In *Schryer v. Fenton* (15 App. Div. 158) it was stated by this court: "It is a familiar doctrine that where, on a sale of personal property, it is agreed that payment therefor shall accompany or precede delivery, the title does not pass until the payment is made."

We think it is entirely obvious from the contract in question that payment and delivery were intended to be concurrent acts. The underlying feature of the contract is that the defendant was to retain possession until paid. It is expressly provided that the sale by the plaintiff, to be public, was to be conducted in the store of the defendant, and the proceeds of each day's sale were to be received each day by the defendant until he had received the full amount of the purchase price due him. Clearly the plaintiff could not conduct the sales to the public elsewhere or remove the property from the store of the defendant for any purpose whatever until he had paid the defendant the full amount due him under his contract of sale. The defendant agreed to give his services without charge until he was fully paid. This provision was in part at least to enable him to have supervision of the property and of the sales thereof to the public and of the proceeds of such sales with a view to enabling him to more certainly secure and procure the amount due him. The contract contained a provision that the defendant would "give possession of store," but by this it was intended merely that the plaintiff should have the use thereof without charge because it had already been provided that the sale to the public was to be held "in the store of second party at 304 Broad St." The emphatic idea is contained in the word "give."

Where the intent of the parties does not clearly appear from the agreement it becomes a question of fact for the jury. (*Empire State Type Founding Company v. Grant*, 114 N. Y. 40, 44; *Bradley v. Wheeler*, 44 id. 495, 501.) But in the present case the intent that delivery and payment should be concurrent clearly appears from the instrument itself. For no other purpose was it provided that the plaintiff should resell the merchandise in the store of the defendant and that the latter should be at liberty to participate in such sale and should have the proceeds thereof from day to day. That feature of the contract unmistakably indicates that the

plaintiff could not have the delivery of the property until he paid for it.

The fact that the plaintiff was to resell the property to third parties is not inconsistent with the retention of title in the defendant. He was really making those sales under the direction of and for the defendant until the latter was paid. *Fennikoh v. Gunn* (59 App. Div. 132) is a case somewhat similar to this where the purchaser of a stock of groceries retailed the same to the public until his vendor received from the proceeds of the sale the amount of his contract price. The agreement in that case provided for a bill of sale when the purchase price was fully paid to the vendor. That provision, however, only expressed what in this case is clearly and just as unequivocally implied, that title should not pass until payment in full.

Nor did the plaintiff have such possession as enables him to maintain this action. From what has already been said it appears that there was no delivery of the property and no intention to deliver the same until the purchase price was paid the defendant. The property remained in his store subject to his control and direction except that it was the duty of the plaintiff to retail the same, but the defendant at all times had access to the property with a right to know what was being done with reference to the same and with a right to the proceeds of each day's sales. Delivery of a key is sometimes symbolic of delivery of possession provided it is so intended but not necessarily so. In the present case the plaintiff's representative had a key to the store but that meant no more than possession of a key by a clerk of a merchant. The rights of the parties rested in contract and the cause of action for conversion was not established.

The judgment should be affirmed, with costs.

All concurred, except KELLOGG, P. J., who dissented with opinion, in which WOODWARD, J., concurred.

KELLOGG, P. J. (dissenting):

It is immaterial who had the legal title to the goods. Each party had an interest in them as they were in the store, and

neither had a right to remove them without the consent of the other.

The defendant, having received the entire purchase price except \$650, forcibly put the plaintiff out of the store and with force removed the goods therefrom to a place or places unknown to the plaintiff. The goods so removed inventoried \$2,400. Clearly this was a wrongful taking from the plaintiff of property in which he was interested, and deprived him of his beneficial interest therein and made the defendant liable for conversion unless he could justify the removal. The decision of the case depends upon the facts to be found by the jury. I, therefore, favor reversal.

WOODWARD, J., concurred.

Judgment affirmed, with costs.

ANNA M. HAMMILL, Respondent, v. THE ORDER OF UNITED
COMMERCIAL TRAVELERS OF AMERICA, Appellant.

Third Department, May 2, 1917.

Insurance — life insurance — provisions of constitution of beneficent association providing for notice of accident construed — necessity for notice after accident and also after death — construction of insurance contract.

Where the constitution of a beneficent association provides that a member sustaining an accident shall give notice thereof within ten days, and that if death result, notice must be given within ten days thereafter, "which death notice shall be in addition to the notice of the accident and shall state the cause of death," it is not necessary that there be two notices in all cases where death results from an accident more than ten days thereafter.

The quoted provision means that when notice of the accident is given by the injured member, and he thereafter dies as a result of such accident, a notice of death must again be given, notwithstanding the first notice.

Moreover, if an injured member has given notice of his injury and made claim for compensation under his certificate, and subsequently dies, the notice thus given is not sufficient and a notice of death must also be given, "which death notice shall be in addition to the notice of the accident."

But where the accident results in death, notice within ten days thereafter is sufficient, although no prior notice of the accident was given.

Where there is any doubt or uncertainty as to the meaning of a contract of insurance, it must be resolved in favor of the insured, the insurer being responsible for the language used.

APPEAL by the defendant, The Order of United Commercial Travelers of America, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of St. Lawrence on the 24th day of May, 1916, upon the decision of the court after a trial before the court without a jury.

Waterman & Waterman [Robert S. Waterman of counsel, and John A. Millener, general counsel, on the brief], for the appellant.

Thomas Spratt [George E. Van Kennen of counsel], for the respondent.

COCHRANE, J..

The plaintiff was beneficiary under a certificate of insurance issued to her brother, Mortimer J. Hammill, by the defendant, a fraternal beneficiary association which indemnified for injuries or death caused by accident. On April 6, 1914, Hammill, while a member in good standing in the order of the defendant, accidentally sustained a fracture at the base of the skull which caused his death seventeen days thereafter on the 23d of April, 1914. The circumstances of the injury and resulting death are such as to bring the case within the protection of the certificate of insurance provided the notice of accident or death required by the contract of insurance was given to the defendant. That is the only question we deem it necessary to discuss.

Whatever notice was required by the contract of insurance it was essential to give and no unforeseen contingency would excuse such notice nor can it be excused because the requirement may seem to be unreasonable. (*Whiteside v. North American Accident Ins. Co.*, 200 N. Y. 320.)

The defendant claims that it was entitled to notice within ten days after the accident and to a second notice within ten days after the death of Hammill. The only notice given was within ten days after his death. We think that was sufficient under the requirements of the contract.

The certificate of insurance provides for two kinds of benefits, *first*, to the member himself in case he survives his

accident, and *second*, to his designated beneficiary in case his accident results in his death. The constitution of the defendant in force at the time of the accident and which is here controlling, provided that a member sustaining an accident should "within ten days after the date of such accident send a notice in writing of said accident (not the results) to the Supreme Secretary, stating his full name and address, and full particulars of his accident." Then follow provisions for forwarding blanks for the preliminary proof of the accident and the return of such proof, and forwarding blanks for the final proof and the return of such proof, and such additional reports and information as may be required. Then follows this provision: "If death shall result under the conditions covered by this Article, a notice of said death must be given in writing to the Supreme Secretary within ten (10) days after said death, which death notice shall be in addition to the notice of the accident and shall state the cause of death."

The appellant argues that the words "which death notice shall be in addition to the notice of the accident," imply that there must be two notices in all cases where death results from an accident more than ten days thereafter. We think it means rather that when notice of the accident is given by the insured member and he thereafter dies as a result of such accident, a notice of death must again be given notwithstanding the first notice. An injured member might consider his injuries trifling and might have no intention of making a claim therefor against the order. But death unexpectedly overtakes him as a result of the accident. The beneficiary under the certificate is not in such a case precluded from making a claim because of want of previous notice. But if on the other hand the injured member has given notice of his injury and made claim for compensation under his certificate and subsequently dies, the notice thus given is not sufficient but a notice of death must also be given "which death notice shall be in addition to the notice of the accident."

If there is any doubt or uncertainty as to the meaning of the contract such doubt must be resolved in favor of the plaintiff because the defendant is responsible for the language used. (*Marshall v. Commercial Travelers' Mutual Accident Assn.*, 170 N. Y. 434, 438.)

We are further persuaded that such is the true intent of the contract because of a change in the constitutional provisions in reference to notice, which change was made after the certificate was issued to Hammill, but before his death. The former constitution contained the following provisions: "In event of any accidental injury on account of which a death claim may be filed against the Order, notice of the accident (not the results) must be given in writing to the Supreme Secretary within ten days thereafter, stating the full name and address of the injured member, date, and full particulars of the accident and the name and address of his medical attendant. In the event of a death resulting from external, violent and accidental means, as hereinbefore provided, notice of the accident must be given as hereinbefore provided, and, in addition, notice of the death must be given in writing to the Supreme Secretary within ten days after the death." Under these provisions very clearly a double notice was necessary in death cases. A material change of language in the two constitutions, however, indicates a material change of purpose and that purpose as we construe the language was the commendable one of removing unnecessary burdens from claimants and abolishing the necessity of double notices in cases where double notices could serve no useful purpose.

Unquestionably if the insured member had died within ten days of the accident the notice given in this case would be sufficient. As we construe the requirements as to notice in death cases such notice does not depend on the length of time which intervenes between the accident and death but if death occurs whether within ten days or not, the same notice suffices. This seems the reasonable construction. No good reason is apparent why a different notice should be required in one case than is required in the other, and if the defendant intended to require a different notice when death occurs more than ten days after the accident than it requires when death results immediately or within ten days of the accident such intent should be made manifest by more specific and definite language.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of CHARLES McNALLY, Respondent, for Compensation under the Workmen's Compensation Law, v. THE DIAMOND MILLS PAPER COMPANY, Alleged Employer, and THE EMPLOYERS' MUTUAL INSURANCE COMPANY OF NEW YORK, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — when employee, injured while installing engine for paper manufacturer, not engaged in a hazardous employment.

Where a person in the business of moving heavy machinery was engaged by a paper company carrying on a hazardous business within the meaning of group 15 of section 2 of the Workmen's Compensation Law, to install an engine, he was not engaged in a hazardous employment within said provision of the statute, nor is he entitled to avail himself of the provisions of group 42 of said section, which specifically includes the installation of "engines or heavy machinery."

The paper company did not carry on the occupation of installing engines or heavy machinery for a pecuniary gain within the meaning of subdivision 5 of section 3 of the statute.

APPEAL by the defendants, The Diamond Mills Paper Company and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 11th day of June, 1916.

Blauvelt & Warren [George A. Blauvelt and Maurice J. O'Callaghan of counsel], for the appellants.

Egburt E. Woodbury, Attorney-General [E. C. Aiken, Deputy Attorney-General, of counsel], for the respondent State Industrial Commission.

COCHRANE, J.:

The employer was engaged in the business of manufacturing paper. At the time of the accident on December 18, 1914, it was installing a large engine in its manufacturing plant. The claimant was in the business of moving heavy machinery and

App. Div.]

Third Department, May, 1917.

for that purpose owned the appropriate and necessary implements and equipment and had in his employ men whose compensation in case of injury he secured by procuring insurance under the Workmen's Compensation Law covering his liability to them in case of accident. He had been employed by the paper company to move the engine from the railroad to the plant for the sum of two hundred dollars. In the performance of this work he had used his own implements and the men in his employ. After the completion of this contract the party from whom the paper company purchased the engine pursuant to a provision in the contract of purchase sent a man to the paper company to superintend the work of installation for which the paper company was to pay seven dollars a day. The latter company furnished a number of its own men for the installation of the engine and also employed temporarily the claimant and two of his employees to assist in that work, paying the claimant three dollars and fifty cents per day for his own services and something less for the services of his two employees. During the progress of the work of installation of the engine the claimant was injured, and an award has been made to him on the theory that he was an employee of the paper company.

Assuming that the claimant was in the employ of the paper company, I am of the opinion that he is not within the protection of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). The business of manufacturing paper is a hazardous employment and falls within group 15 of section 2 of the act. But the claimant was not exposed to the hazards of that business. His employment was of a special character. Installing this engine had no relation to the hazards of paper making except that it increased the facilities for that purpose. In his claim for compensation filed with the Commission he stated in answer to questions that his occupation when injured was "helping erect engine" and that he had worked at this occupation "off and on about 30 years." It does not appear that the plant was in operation at the time of the accident. From the fact that this large engine was being installed we may perhaps infer that the work of manufacturing paper was in abeyance until the engine was in place. But however that

may be the claimant was not employed to manufacture paper nor did he come within the risks of that business, nor was he in fact injured by the operation of the paper mill. His work in installing this engine was of the same character as that which he was accustomed to do in other places irrespective of whether or not the general business there conducted was hazardous. It seems very clear that the claimant was not engaged in a hazardous employment included within group 15.

Nor can the claimant avail himself of the provisions of group 42, which specifically includes the installation of "engines or heavy machinery." The case of *Matter of Bargey v. Massaro Macaroni Company* (218 N. Y. 410) is directly opposed to this contention. In that case it was held that the employee who was a carpenter by occupation and had been repairing the building wherein a hazardous business was conducted was not himself engaged in that business or entitled to the protection of the law on that account. It was further contended that he was within group 42. The court said: "The appellant invokes also the part of the language creating group 42 as follows: 'construction, repair and demolition of buildings.' It is answered by the fact that the company did not carry on the occupation of constructing, repairing and demolishing buildings for pecuniary gain. This conclusion is obvious beyond the need of discussion." (See, also, *Coleman v. Bartholomew*, 175 App. Div. 122.) In the present case the paper company did not carry on the occupation of installing engines or heavy machinery for pecuniary gain. (§ 3, subd. 5.)

The award should be reversed and the claim dismissed.

All concurred.

Award reversed and claim dismissed.

App. Div.]

Third Department, May, 1917.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of PHILIP PAVIA, Appellant, for Compensation under the Workmen's Compensation Law, v. THE PETROLEUM IRON WORKS COMPANY OF PENNSYLVANIA, Employer, Respondent.

Third Department, May 2, 1917.

Workmen's Compensation Law — election of remedies — when decision to claim under statute conclusive.

Where an employer has not secured compensation to his employees, as required by section 50 of the Workmen's Compensation Law, an employee may, under sections 52 and 11 of the statute, at his option, elect to claim compensation thereunder or to maintain an action for damages, but he cannot have the benefit of both remedies, and an election once made, intelligently and with knowledge of the facts, is conclusive.

Where a claimant with full knowledge of the situation before an award was made, and with competent counsel permitted the award in his favor, he thereby confirms his election to accept such remedy.

A party must not experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him, and then, if dissatisfied, repudiate the award and seek the other remedy permitted by the statute.

APPEAL by the claimant, Philip Pavia, from a decision of the State Industrial Commission, made on the 27th day of July, 1916, denying his application for leave to withdraw his claim for compensation herein.

Cornelius J. Earley, for the appellant.

Caldwell & Masslich [*Theodore F. Silkman* of counsel], for the defendant, respondent.

COCHRANE, J.:

This is an appeal from a decision of the State Industrial Commission denying the application of the claimant to withdraw his claim for compensation so that he may proceed by action against the employer.

The claimant was injured December 9, 1915. The employer had not secured compensation to his employees as required by section 50 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of

1914, chap. 316). The claimant, therefore, under sections 52 and 11 of that act might at his option elect to claim compensation thereunder or to maintain an action for damages. He could not have the benefit of both remedies, and an election once made with knowledge of the facts confined him to the remedy which he thus elected. Section 51 requires an employer who has complied with the law as to security for compensation to "post and maintain in a conspicuous place or places in or about his place or places of business typewritten or printed notices in form prescribed by the Commission, stating the fact that he has complied with all the rules and regulations of the Commission and that he has secured the payment of compensation to his employees and their dependents." The law, therefore, takes very good care that an employee shall be adequately informed as to whether or not his employer has complied with the law and there is no reason why save in exceptional instances the employee should be ignorant of his rights.

In the present case the claimant on February 20, 1916, more than two months after the accident, submitted to the Commission his first notice of injury in which he stated among other things that the employer had furnished him medical service at his request. Application for compensation was made March 14, 1916. On April 11, 1916, the Commission wrote the attorney of the claimant as follows: "Supplementing our letter to you of April 4th, 1916, we wish to advise that on December 9, 1915, the Petroleum Iron Works of Pennsylvania, did not carry insurance as required by the Workmen's Compensation Law of the State of New York." The claim was heard April 17, 1916, by the Commission, and an award on that day was made in favor of the claimant and the claim continued for further hearing. On April twentieth payment of the award was tendered by the employer and refused by the claimant. On the following day, April twenty-first, the claimant filed with the Commission a statement that he withdrew his claim for compensation stating that it was his intention to prosecute his common-law remedy under the laws of this State. This notice although not filed with the Commission until April twenty-first, was dated April fourteenth, three days before the claim was heard by the Com-

App. Div.]

Third Department, May, 1917.

mission and the award made, and recited the fact that the attorney of the claimant had received the communication above mentioned of April eleventh, from the Commission to the effect that the employer did not carry insurance as required by the statute.

With full knowledge of the situation, therefore, before an award was made and with competent counsel to guide and advise him, the claimant permitted an award to be made in his favor and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretense that he did not fully understand his rights before the award was made. A party cannot experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him and then if dissatisfied repudiate the award and seek the other remedy permitted by the statute. His election once made intelligently and with knowledge of the facts should be conclusive. The Commission was clearly right in denying the application to discontinue the claim.

Decision unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of EFFIE D. PARDY, Respondent, for Compensation to Herself and Children under the Workmen's Compensation Law for the Death of Her Husband, PERKINS PARDY, v. BOOMHOWER GROCERY COMPANY, Employer, and COAL MERCHANTS MUTUAL INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — hazardous employment — manufacture of butter — group 33 of section 2 of Workmen's Compensation Law construed.

The manufacture of butter is not a hazardous employment within the meaning of group 33 of section 2 of the Workmen's Compensation Law, which provides that hazardous employments shall include the following: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries."

Hence, compensation cannot be allowed under said provision for the death of an employee of a grocery company resulting from blood poisoning caused by an injury to his hand while packing butter in tubs.

APPEAL by Boomhower Grocery Company and another from an award of the State Industrial Commission, made on the 22d day of November, 1916, affirming a prior award made on the 13th day of June, 1916.

Clement & Lee [*H. Walter Lee* of counsel], for the appellant.

Egburt E. Woodbury, Attorney-General [*E. C. Aiken, Deputy Attorney-General*, of counsel], for the respondent State Industrial Commission.

COCHRANE, J.:

The employer was engaged in a general grocery business and also in the operation of a butter factory. On October 29, 1915, the employee while packing butter in tubs was revolving a tub in the performance of his work and a splinter from one of the hoops of the tub penetrated the palm of his hand and the wound thereby occasioned becoming infected, blood poisoning resulted which caused his death. An award has been made to his widow and children. The only group under section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) which is suggested as including this claim is group 33, which at the time of the accident was as follows: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries." For several reasons we are persuaded that the claim is not within this group.

First. The expression "food stuffs" as used in group 33 evidently means food which may be subjected to "canning" or similar "preparation." Clearly group 33 does not include all kinds of food because if it did the statute would not specifically provide in group 29 for "cereals" or in group 30 for "meats or meat products," or in group 34 for "crackers and biscuits." Such a construction must be given to the statute if possible as will render every part thereof useful or purposeful, and if butter is included in group 33, there is no reason why the cereals of group 29, or the meat preparation of group 30, or the crackers and biscuits of group 34, should not likewise be included in group 33, and the provisions in

respect to those articles in the other groups mentioned would be useless.

Second. In the various groups of section 2, a clear and well-defined distinction is made between the use of the term "manufacture" and the term "preparation." Butter is an article which is more naturally and properly classified with those that are manufactured. In common parlance the housewife does not prepare but "makes" butter. The producer and consumer alike speak of butter as an article made or manufactured rather than as something which is prepared as by canning or other similar process. It is brought into existence by a mechanical process. Not only in common parlance but by legislative recognition is it a manufactured product. Section 30 of the Agricultural Law (Consol. Laws, chap. 1 [Laws of 1909, chap. 9], as amd. by Laws of 1913, chap. 455) contains the following definition: "The term 'butter' when used in this article means the product of the dairy, usually known by that term, which is manufactured exclusively from pure, unadulterated milk or cream or both with or without salt or coloring matter." Group 29 of section 2 of the Workmen's Compensation Law speaks of the manufacture of cereals. Group 30 of the manufacture or preparation (meaning apparently similar preparation) of meats, and group 34 of the manufacture of crackers and biscuits; and by clear analogy butter if intended to be within the act would likewise be designated as a manufactured article and would not be included in a group, the dominating idea of which is not the process of manufacturing but the process of "canning" or some "preparation" which evidently means some preparation akin or similar to canning which merely modifies the form but does not destroy the identity of the articles to which the canning process or other similar preparation applies. In the amendment to group 33 hereafter mentioned the Legislature says "manufacture of dairy products." (Laws of 1916, chap. 622.) Group 33 as it was before the amendment had reference to the canning or similar preparation of food which subjects it to some change without bringing into existence a new product. Butter is a newly formed product to which the idea of canning or any similar preparation is quite inapplicable. The word "preparation" as used in group 30 and

group 33 is subject to the well-known canon of construction that "words, however general, may be limited with respect to the subject-matter in relation to which they are used." (*People v. Richards*, 108 N. Y. 137, 150.)

Third. Butter making is one of the great industries of the State. It would seem that had the Legislature intended to include it as a hazardous employment it would not have left the matter to conjecture or argument. In *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84) it was said by Chief Judge BARTLETT: "The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom." Since the accident, group 33 has been amended by adding thereto the words "manufacture of dairy products" which clearly includes the manufacture of butter. And this amendment indicates that in the view of the Legislature the manufacture of butter or other dairy products had not previously been made a hazardous employment. Otherwise there was no necessity for the amendment.

The award should be reversed and the claim dismissed.

All concurred.

Award reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of EUGENE H. HIERS, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN A. HULL & Co., Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — hazardous employment — weighing hides constituting cargoes unloaded from vessels — accidental injury — injury to employee from anthrax germs while handling hides.

An employee engaged in weighing hides on piers, which hides constitute cargoes or parts of cargoes unloaded from vessels, is engaged in a hazardous

App. Div.]

Third Department, May, 1917.

employment within the meaning of group 10 of section 2 of the Workmen's Compensation Law.

Such an employee who, while handling dirty and diseased hides, was infected by anthrax germs through an abrasion in his hand, previously sustained while handling hides covered with wet salt, sustained an accidental injury within the meaning of subdivision 7 of section 3 of the statute.

Moreover, because of the previous abrasion on the hand of the employee, the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result from such injury within the meaning of the statute."

APPEAL by the defendants, John A. Hull & Co., and another, from an award of the State Industrial Commission, entered in the New York office of said Commission on the 4th day of May, 1916.

Alfred W. Andrews [*John N. Carlisle* of counsel], for the appellants.

Egburt E. Woodbury, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondent State Industrial Commission.

COCHRANE, J.:

The occupation of the claimant was weighing hides on the piers in Brooklyn, which hides constituted cargoes or parts of cargoes unloaded from vessels. He was doing this work in the performance of the duties which as an employee he owed to his employer. The employment was, therefore, hazardous within the meaning of group 10 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41).

Previous to February 10, 1916, while in the same work, wet salt from the hides had permeated his gloves and caused a swelling on the back of one of his hands and an abrasion of the skin or fissure resulted. On the day mentioned he was handling dirty and diseased hides and anthrax germs contained therein were communicated to him through the fissure in the back of his hand causing infection and disease for which the award in question has been made.

Subdivision 7 of section 3 of the act defines an injury for which compensation may be made as meaning "only accidental injuries arising out of and in the course of employ-

ment and such disease or infection as may naturally and unavoidably result therefrom."

In *Bacon v. United States Mutual Accident Association* (123 N. Y. 304) an anthrax case was before the court in an action on a policy of insurance against "bodily injuries effected through external, violent and accidental means within the intent and meaning of the by-laws of the association and the conditions" of the policy. The insurance was not to extend "to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date" of the policy "nor to any case except where the injury is the proximate or sole cause of the disability or death." It was held that anthrax was a disease and that the disease was not caused by an accident within the meaning of the policy. That case was decided with reference to the particular provisions and phraseology of the policy then under consideration and it is quite clear that it constitutes no precedent under the statute we are now called upon to apply.

In *Matter of Plass v. Central New England Railway Company* (169 App. Div. 826) this court held that contact with poison ivy constitutes a personal injury within the meaning of the statute.

There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation or is a natural outcome thereof. It is expected, usual and ordinary. This disease incurred by the claimant was unexpected, unusual and extraordinary; as much so as if a serpent concealed in the hides had attacked him. There is no difference in principle because the attack instead of being made unexpectedly by a concealed serpent was made unexpectedly by a concealed disease germ. There seems to be no question in this case but that the claimant contracted the disease in the manner and under the conditions above indicated. We think the circumstances constitute an accidental injury within the meaning of the statute.

However, there is another theory on which this award may be upheld. The claimant in the course of his employ-

app. Div.]

Third Department, May, 1917.

ment and as a result thereof had received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment and the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result" from such injury within the meaning of the statute.

The award should be affirmed.

Award unanimously affirmed.

OUTCAULT ADVERTISING COMPANY, Appellant, v. H. BLAKE
STRATTON, Respondent.

Third Department, May 2, 1917.

Contract — evidence sustaining defendant's right to cancel contract notwithstanding express provision thereof to contrary — negligence — failure of party to read paper before signing — fraud.

In an action upon an advertising contract which provided that "this contract cannot be cancelled" and that "all promises and agreements are stated herein; verbal agreements with salesmen not authorized," the defendant claimed that when the contract was made with the plaintiff's agent he informed him that he contemplated going out of business, and that it was then agreed between them that if he did so he should be at liberty to cancel the contract, and that the agent promised to insert such provision. Evidence examined, and *held*, sufficient to establish the defendant's contention.

The negligence of a party in failing to read a paper which he signs does not necessarily preclude him from asserting its invalidity on the ground of fraud.

APPEAL by the plaintiff, Outcault Advertising Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Sullivan on the 24th day of May, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of June, 1916, denying plaintiff's motion for a new trial made upon the minutes.

Samuel A. Kobac [*Joseph I. Stahl* of counsel], for the appellant.

John D. Lyons, for the respondent.

COCHRANE, J.:

On February 2, 1912, the plaintiff by its agent, Louis Levine, made a written contract with the defendant who was a dealer in furniture to provide him with advertising material for one year after May 1, 1912, at the rate of three dollars per week. The contract contained these provisions: "This contract cannot be cancelled;" "All promises and agreements are stated herein; verbal agreements with salesman not authorized."

When the contract was made defendant was attempting to dispose of his business. He had previously secured the services of an agent to negotiate a sale thereof. And about three weeks after the contract with the plaintiff, the defendant did sell out his business.

The defense is that when the contract was made with the plaintiff's agent, Levine, the defendant informed him that he contemplated going out of business and that it was then agreed between them that if he did so he should be at liberty to cancel the contract and that Levine promised to insert such a provision in the contract. The allegation of the answer is that Levine by false and fraudulent representations procured the defendant to sign the contract, the representations being that he had inserted in the contract a provision whereby the defendant might cancel the same in case he sold out his business which representation was false as the contract does not contain any such provision, but on the contrary provides that it cannot be canceled.

The defendant and his clerk both testified that Levine, who prepared the contract in the defendant's store, promised to insert therein a provision for cancellation thereof after the defendant had explained to him that he contemplated selling his business and that Levine also stated after the oral arrangement had been made to that effect that he had made the necessary provision in the contract. This was denied by Levine but the jury have found the facts as claimed by the defendant. The defendant says he did not read the contract but trusted to Levine's statement that he had inserted therein

App. Div.]

Third Department, May, 1917.

the cancellation provision and that he did not read the copy of the contract which was left with him by Levine until after the commencement of this action. Immediately on selling his business the defendant notified the plaintiff and stated that he wished to cancel the contract for advertising services.

It is contended that the defendant was negligent in not reading the contract and informing himself of its contents. There are decisions and statements in text books that the negligence of a party in failing to read a paper which he signs precludes him from asserting its invalidity on the ground of fraud. But in this State such rule has been authoritatively and decisively repudiated by the court of last resort. In *Albany City Savings Institution v. Burdick* (87 N. Y. 40) it was written: "It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defense to the action; but where one sues another for a positive, willful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief." In *Wilcox v. American Telephone & Telegraph Company* (176 N. Y. 115) the rule as above declared was reiterated and emphasized. That case also holds that the injured party is not required to resort to a court of equity for relief.

The judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

CLINTON D. RIEGEL, Appellant, v. GEORGE H. LARNARD,
Respondent.

Third Department, May 2, 1917.

**Real property — action for breach of covenant of deed — evidence —
when conversations between parties inadmissible.**

In an action for the breach of covenant of a deed from defendant to plaintiff, the latter must stand on the deed itself.

In construing the plaintiff's deed, all other deeds to which it refers and which refer to each other are required to be considered.

Where in such an action there is no uncertainty or ambiguity as to the land actually conveyed, conversations and negotiations between the parties are inadmissible in evidence.

KELLOGG, P. J., dissented.

APPEAL by the plaintiff, Clinton D. Riegel, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Tioga on the 6th day of September, 1916, upon the decision of the court dismissing the complaint on the merits after a trial before the court, a jury having been waived.

Charles C. Annabel [*James O. Sebring* of counsel], for the appellant.

Frank A. Bell, for the respondent.

COCHRANE, J.:

This is an action for a breach of covenant of a deed from defendant to plaintiff. In such an action the plaintiff must stand on the deed itself. His deed by reference to other deeds in his chain of title clearly indicates that the Updike lot was excluded. In construing his deed, all other deeds to which it refers and which refer to each other are required to be considered. (*Grandin v. Hernandez*, 29 Hun, 399, 402; *French v. Carhart*, 1 N. Y. 96.) The plaintiff has received exactly what his deed in connection with other deeds to which it refers purports to give him. If he had brought his action for fraud or mistake, the excluded evidence would be quite material, but standing as he does on his conveyance and alleging a breach of covenant therein contained and there being no uncertainty or ambiguity as to the land actually conveyed, conversations and negotiations between the parties were properly excluded. I think, therefore, the excluded testimony was immaterial.

The judgment should be affirmed, with costs.

All concurred, except KELLOGG, P. J., dissenting; SEWELL, J., not sitting.

Judgment affirmed, with costs.

App. Div.]

Third Department, May, 1917.

THE W. L. WAPLES CO., Respondent, v. THE STATE OF NEW YORK, Appellant.

Third Department, May 2, 1917.

Contract — agreement to clean and waterproof stone surface of State Capitol building construed — liability to contractor for delay due to examination and acceptance of method of waterproofing, and also for temporary suspensions ordered because of noise interrupting hearings being held in building.

A contractor with the State agreed to furnish the material and labor necessary for cleaning, pointing and waterproofing the stone work of a portion of the exterior of the State Capitol building. The contract provided that the work should be commenced promptly and prosecuted with diligence, and that the contractor should be liable in specified liquidated damages for each day of delay beyond the date named for completion, and that "no charges shall be made by the contractor for any delays or hindrances from any cause during the progress of any portion of the work embraced in his contract;" but that should a delay be caused by any act of the State authorities, the contractor would be allowed an extension of time. The contract also provided that the stone surfaces should "be treated by a method to be proposed by the contractor that will waterproof and preserve the stone, without changing the appearance of the building, for a period of five years, and which the contractor shall guarantee by a surety company bond in the amount to be stated in his proposal."

Held, that the reasonable and necessary delays by the State in fixing upon the method of waterproofing to be used were within the contemplation of the contract, and hence the State should not be held liable on account thereof if defendant granted the contractor a corresponding extension of time in which to complete its contract;

But delay resulting from the holding of the impeachment trial necessitating temporary suspensions of the work because of the noise from the sand blasts was not within the contemplation of the parties, and hence the State is liable for damages resulting therefrom:

KELLOGG, P. J., and COCHRANE, J., dissented.

APPEAL by the defendant, The State of New York, from an order and determination of the Court of Claims, entered in the office of the clerk of said court on the 22d day of May, 1916, awarding claimant the sum of \$465.

Egburt E. Woodbury, Attorney-General [*Edmund H. Lewis*, Deputy Attorney-General, of counsel], for the appellant.

William E. Woollard, for the respondent.

LYON, J.:

On July 29, 1913, the claimant entered into a contract with the State to furnish the material and labor necessary for cleaning, pointing and waterproofing the stone work of the exterior, and of the central and two western courts of the State Capitol building at Albany. The contract provided that the work should be commenced promptly and prosecuted with diligence, and that the claimant should be liable in specified liquidated damages for each day of delay beyond the date named for completion, and that "no charges shall be made by the contractor for any delays or hindrances from any cause during the progress of any portion of the work embraced in his contract;" but that should a delay be caused by any act of the State authorities, the contractor would be allowed an extension of time for completion of the work sufficient to allow for the delay. The contract also contained the following clause: "By waterproofing is meant that all stone surfaces of the exterior of the building and the central court and two western courts shall be treated by a method to be proposed by the contractor that will waterproof and preserve the stone, without changing the appearance of the building, for a period of five years, and which the contractor shall guarantee by a surety company bond in amount to be stated in his proposal."

The claimant entered upon the performance of the contract about one week after its execution and prosecuted the work with diligence. His method of operation was first to clean the stone work by means of a compressed air sand blast; next to do the pointing, that is, to fill the interstices between the stones with cement, which the workmen did standing upon a swinging scaffold suspended from the top of the building by means of pulleys and ropes, and lowered as the work progressed, thus in full descent pointing a strip about twenty feet wide extending from the top of the building to the ground; and lastly to do the waterproofing which consisted simply of applying a liquid to the surface of the stones by means of brushes. The plan of the claimant was to immediately follow the pointing of a strip of the building, with the waterproofing, thus avoiding making any change in the location of the pulleys and scaffold until the work of both pointing and waterproofing of the strip had been completed.

Following the entering of the claimant upon the performance of the contract, experiments were made with three or more kinds of waterproofing preparations, and about September first one was found which was satisfactory. In the meantime the work of pointing, without waterproofing being done, had progressed over the space of twenty-five strips, making it necessary for the claimant in order to do the waterproofing over these strips to rehang the pulleys and scaffold twenty-five times, each of which required the services of two men for three hours at a cost to claimant of seventy-five cents per hour. This expense which the claimant alleges was made necessary solely by the delay of the State authorities in specifying the kind of waterproofing to be used, is stated in the claim, and has been carried through the proceedings, and stated in the award as \$225, whereas the correct computation would seem to be \$112.50. This charge constituted the first of the two items of the claim in controversy amounting to \$465.

The second item is of \$240 on account of suspensions of claimant's work, between September seventeenth and October eighteenth, for periods of a few hours each aggregating six hundred hours, made necessary by demands of the State authorities that the claimant temporarily cease operating the sand blast, the noise from which disturbed the hearings of the Sulzer impeachment trial being had in the Senate chamber. The claimant's employees were day laborers, and claimant was compelled to pay them full day wages without the benefit of any deduction on account of short suspensions of work.

The Court of Claims allowed the claim in full, and from such determination this appeal has been taken. The items of the bill as to time lost are not seriously questioned by the State, and practically the only question to be considered by us is whether they constitute legal claims against the State.

As to the first item, the kind of waterproofing to be used was not fixed, but by the terms of the contract was to be proposed by the contractor, and to possess the qualities of preserving the stone and not changing the appearance of the building. Clearly the contract contemplated, as acknowledged by the claimant in its communication to the State Architect of August 13, 1913, that the material proposed by the con-

tractor should be subjected, before acceptance, to tests to be made by the State Architect and his assistants. Concededly the waterproofing designated by the claimant August thirteenth, after the contract work had progressed for fully one week, the result of the application of which proofing upon a marble slab was to be submitted to the State Architect the following Monday, August eighteenth, did not comply with the provisions of the contract as it badly blackened the stone. At what times the other makes of waterproofing, which the evidence indicates were at least two, were submitted by the contractor does not appear, but the claimant's president testified that the last day of delay for which it was making claim on account of re-erecting the scaffold had been settled on as about September first. Hence the period of alleged delay upon the part of the State must have been confined to the two weeks commencing August eighteenth and ending September first. The letter of the State Architect of date September fifteenth authorizing the use of a certain waterproofing compound was plainly intended as a formal recognition of the claimant's right to use such material, as the evidence shows that the material was used by the claimant prior to the date of the letter, and undoubtedly on or about September first, under a verbal or less formal acquiescence.

It appears from the letter of the representative of a waterproofing compound proposed by the claimant that time was necessary for the proofing to cure after being applied in order to determine the result of its use. The selection of the proper waterproofing was a matter of importance, and the State was entitled to take all the time necessary in which to investigate as to the merits of the various compounds and to reach an intelligent conclusion. I think that all reasonable and necessary delays incident to that purpose should be held to have been within the contemplation of the contract, and hence that under the clause before quoted the State should be held to be exempted from all liability on account thereof but that the claimant was entitled to a corresponding extension of time in which to complete its contract. This was apparently allowed it as no claim seems to have been made by the State for the stipulated penalty on account of the failure of the claimant to complete the contract within the stipulated period.

App. Div.]

Third Department, May, 1917.

Under the contract the burden of obtaining and proposing to the State Architect suitable waterproofing was upon the claimant. Upon the hearing before the Court of Claims the burden of establishing the liability of the State was also upon the claimant. The evidence fails to establish claimant's contention that the State subjected the claimant to any unreasonable or unnecessary delay in fixing upon the waterproofing to be used. I think, therefore, that the first item of the claim should have been disallowed.

The second item of damages stands upon a different footing. The contract should be reasonably construed. (*Curnan v. D. & O. R. R. Co.*, 138 N. Y. 480.) That there would be delay resulting from the holding of the impeachment trial necessitating temporary suspensions of the work was plainly not within the contemplation of the parties. These delays were caused by the active interference of the State authorities in the prosecution by claimant of its work which so far as appears was being properly conducted and making no more noise than was actually necessary. The contract had not in contemplation that compensation was to be made for such delays by mere extension of time for the performance of the contract. I think the allowance of the second item of the claim was proper.

The judgment appealed from should be modified by reducing the award to \$240, and as so modified affirmed, without costs to either party in this court.

All concurred, except KELLOGG, P. J., and COCHRANE, J., who dissented, and voted for reversal.

Judgment modified by reducing the award to \$240, and as so modified affirmed, without costs to either party in this court.

ELEANOR H. DAVIDSON, Respondent, v. LOUIS M. REAM,
Appellant.

Third Department, May 10, 1917.

Husband and wife — validity of judgment annulling marriage, where court had no jurisdiction — application by plaintiff to set aside said judgment — due process of law — conduct of plaintiff authorizing divorce no defense — jurisdiction to set aside marriages — common-law marriage — want of jurisdiction.

The plaintiff in an action for the annulment of her marriage in which a judgment of a court of equity was entered in her favor, although the court had no jurisdiction, there being no statutory ground for the annulment, is entitled to have the judgment set aside, by a justice other than the one who presided at the trial, not because of any equitable consideration for her, but because the judgment does not rest upon jurisdictional facts, and because she has not been deprived of her marital rights by due process of law.

The fact that the conduct of the plaintiff justifies the granting of a divorce is not available to the defendant in this action to prevent the setting aside of the judgment of annulment secured through an imposition upon the court and in which it did not have jurisdiction.

There is no general equitable jurisdiction to set aside marriages. The power to deal with matrimonial actions must be found in the statutes.

Wherever there is want of authority to hear and determine the subject-matter of a controversy, an adjudication upon the merits is a nullity and does not estop even an assenting party.

Where two parties, there being no legal impediment to the contract of a marriage between them, procure a marriage ceremony to be performed in the State of New Jersey, but fail to secure the proper license, and upon returning to this State cohabit as man and wife and mutually introduce each other as husband and wife to many people, a common-law marriage within this State is effected.

Want of jurisdiction, which is a pure question of law, may always be asserted and raised directly or collaterally, either from inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof which is always admissible for that purpose.

APPEAL by the defendant, Louis M. Ream, from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Rensselaer on the 14th day of November, 1916, resettling a prior order

App. Div.]

Third Department, May, 1917.

entered in said clerk's office on the 30th day of October, 1916, setting aside and vacating and declaring void and of no effect the judgment herein, entered on the 16th day of January, 1912, annulling a marriage between the parties.

Also an appeal from an order entered in said clerk's office on or about the 6th day of March, 1917, denying defendant's motion for a rehearing upon the ground of newly-discovered evidence.

Arthur L. Andrews [*Lindley M. Garrison* of counsel], for the appellant.

Edgar T. Brackett, for the respondent.

WOODWARD, J.:

The action in which these motions have been made and decided was instituted in November, 1911. They have been argued at the same term of court, and may properly be disposed of in a single opinion. There is much in the affidavits before the court upon the several motions which tends to dissipate the theory that the plaintiff is a wronged woman, or that she has any claims upon a court of equity, but none of these things affords any justification for the reversal of the orders here on appeal. Whatever might be the disposition of this court, if considering an application of the plaintiff for equitable relief, the situation here is that the plaintiff is asking to be relieved from a judgment which was procured in a court of equity, where that court was without jurisdiction to act. The lack of jurisdiction makes the original judgment and the record of its action utterly void and unavailable for any purpose, and while the plaintiff might rely upon this situation, she is at liberty by a more direct and summary proceeding to have the judgment set aside and vacated, and this right is not affected by the fact that this application is made before a different justice from the one who presided at the time the judgment was granted. (*Kamp v. Kamp*, 59 N. Y. 212, 216-218, and authorities there cited.) The application in the case now before us is not to reverse the judgment of the court, or to consider the merits of the controversy, but to prevent the enforcement or recognition of a void

judgment (*Kamp v. Kamp, supra*), and the fact that the plaintiff was, in form at least, the moving party in the original action does not estop her from invoking the aid of this court. Wherever there is want of authority to hear and determine the subject-matter of the controversy an adjudication upon the merits is a nullity and does not estop even an assenting party. (*Matter of Walker*, 136 N. Y. 20, 29, and authority there cited; *Risley v. Phenix Bank of City of New York*, 83 id. 318, 337; *O'Donoghue v. Boies*, 159 id. 87, 98, 99, and authorities cited.) The history of this litigation is so fully covered by the able and learned opinion of the court below (97 Misc. Rep. 89) that it seems unnecessary to go into it further, except to point out that the Court of Appeals has, in an opinion rendered since the motion was decided, held squarely that a common-law marriage is valid in the State of New York, and was at the time this marriage was contracted (*Matter of Ziegler v. Cassidy's Sons*, 220 N. Y. 98, 111), and the facts which are now before the court plainly show that there was a valid marriage between the parties. Both the plaintiff and defendant were over twenty-one years of age at the time of this marriage, and no legal impediment to the contracting of a marriage on the part of either of them is suggested. They became engaged to marry within the State of New York; they made arrangements to go from the State of New York into the adjoining State of New Jersey for a marriage ceremony; they went into New Jersey and apparently made an effort in good faith to have a ceremonial marriage, and a ceremonial marriage, evidenced by a certificate in due form, was performed by one who is conceded to have had the general powers necessary to such a ceremony, and the only defect in the marriage which is suggested is that the parties, though trying to procure a marriage license, as provided by the laws of New Jersey, failed to secure the proper license. After this ceremony was performed the parties returned to New York, cohabitated as man and wife, and mutually introduced each other as husband and wife to many people, both in the States of New York and New Jersey. It is true that the plaintiff in her complaint alleges that "neither the plaintiff nor the defendant desired, intended or contemplated a common-law marriage, and did not undertake, enter into or contract a

App. Div.]

Third Department, May, 1917.

common-law marriage," but the history of this litigation, and the fact that the court had no jurisdiction of an action to set aside a valid marriage, does not justify the conclusion. What the parties actually did, not what the designing and deluded plaintiff says, is the controlling element, and it is not to be doubted that the conduct of the parties, under all the circumstances, resulted in a common-law marriage within the State of New York, regardless of the effect of the New Jersey statute. Assume for the moment that the ceremony was utterly void. That could have no affirmative effect; it was merely as if no ceremony had been pronounced. It took nothing from the intent of the parties to enter into the marriage relation. That intent was formed in the State of New York; it is conceded that there was an engagement which would have given rise to an action for breach of promise if the defendant had failed to perform. They went into the State of New Jersey, and, we may assume, took no action looking to the consummation of the engagement — the intent to marry. They came back into the State of New York with no intent of not being married; they publicly assumed the relations of husband and wife; they cohabited and introduced each other as husband and wife to many relatives and friends, and this clearly constituted a common-law marriage within the State of New York. These facts were not disclosed in the pleadings in the original action, and no cause of action known to the laws of this State was pleaded. To permit the judgment to stand is to give countenance to a proceeding which cannot be justified upon any sound code of ethics, or considerations of public policy; we cannot permit our courts to become the mere auxiliaries of those who make use of the forms of law to indulge their passions. Conceding, therefore, that the plaintiff appears in the proceeding as a mere adventuress, and that she is not entitled to equitable consideration, she is yet asking this court to do what the court might properly do upon its own motion (*Davidsburgh v. Knickerbocker Life Insurance Co.*, 90 N. Y. 526, 529, 530), and as it leaves the parties exactly where they were at the time the original action was instituted, we may assume that no legal wrong will befall either of them.

The common-law marriage which would thus exist in the

State of New York must be presumed to have resulted equally in the State of New Jersey, which, being one of the original States, is presumed to have the same common law as ourselves, and section 11 of chapter 274 of the Laws of 1910 of the State of New Jersey provides that "nothing in this act contained shall be deemed or taken to render any common law or other marriage, otherwise lawful, invalid by reason of the failure to take out a license as is herein provided." It is thus clear that the only objection urged against the validity of the marriage between the parties is without force, and that the judgment in the original action has no legitimate foundation, while the matters pointed out by the learned court at Special Term at folios 1236, 1239, 1295, 1296, and reported in 97 Miscellaneous Reports at pp. 102, 103, 118, 119, might properly be considered in connection with the recent rulings of the court in *Matter of Palmieri* (176 App. Div. 58). There can be no doubt that the original judgment would not have been entered had the court been properly advised of the true facts in the case, and it is due to the dignity of this tribunal that the order appealed from be affirmed.

This view of the case, of course, makes it unnecessary to consider seriously the appeals from the orders denying the motions for a rehearing on the ground of newly-discovered evidence, and the motion for a resettlement of the order. If the conduct of the plaintiff has been such as justifies the granting of a divorce there is nothing to prevent the defendant coming into the courts of this State and maintaining his action; but such conduct is not available to the defendant in this action to prevent the setting aside of a judgment secured through an imposition upon the court, and in which the court did not have jurisdiction. There is no general equitable jurisdiction to set aside marriages; the power to deal with matrimonial actions must be found in the statutes (*Stokes v. Stokes*, 198 N. Y. 301, 304; *Walter v. Walter*, 217 id. 439), and we know of no provision of the Code of Civil Procedure (See Dom. Rel. Law [Consol. Laws, chap. 14; Laws of 1909, chap. 19], § 7) which permits of an action to annul a marriage between two persons of full age, sound mind, without living husband or wife, and free from incapacitating physical defects. Section 1742 of the Code of Civil Pro-

cedure permits of an action by a woman married under the age of sixteen years, and section 1743 provides for an action to procure a judgment declaring a marriage contract void and annulling the marriage for certain specified causes, but among these there are none covered by the pleadings in the original action, and the express mention of these specified causes of course operates to exclude all others. The rule is established that "'a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally.'" (*O'Donoghue v. Boies*, 159 N. Y. 87, 99, and authorities there cited.) This is exactly the situation presented here; the cause of action attempted to be asserted in the action is not one of those which are enumerated in the Code of Civil Procedure, and the plaintiff in that action might, if she choose, proceed exactly as though no judgment had in form been entered. She has chosen to proceed directly by motion in the action, and no matter what her conduct may have been, she is entitled to the order of this court, not because of any equitable consideration for her, but because the judgment does not rest upon jurisdictional facts — because she has not been deprived of her marital rights by due process of law. The want of jurisdiction, which is a pure question of law, may always be asserted and raised directly or collaterally, either from an inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof, which is always admissible for that purpose (*O'Donoghue v. Boies, supra*), and misconduct does not deprive people of their equal rights under the law. The plaintiff here, if as bad as she has pleaded herself, supplemented by the affidavits of those who have sought to prevent the granting of the order, is still entitled to her rights under the law. As Lord CHATHAM has so well said, "In his person, though he were the worst of men, I contend for the safety and security of the best; and, God forbid, my Lords, that there should be a power in this country of measuring the civil rights of the subject by his moral character, or by any other rule but the fixed laws of

the land." (Celebrated Speeches of Chatham, Burke and Erskine, pp. 24, 25.)

The orders appealed from should be affirmed, with costs.

All concurred; KELLOGG, P. J., in result.

Orders affirmed, with ten dollars costs and disbursements in each case.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
Appellant, v. WALTER C. WITHERBEE and CHESTER B.
McLAUGHLIN, Respondents, Impleaded with SPENCER G.
PRIME, Appellant, Respondent.

JOHN F. O'BRIEN and GEORGE A. STEVENS, Appellants.

Third Department, May 2, 1917.

Constitutional law — validity of stipulation and judgment disposing of lands in forest preserve in violation of Constitution, article 7, section 7 — effect of vacating said judgment on right of parties to litigate question of title — right of defendant to withdraw as party.

Where, in an action in ejectment by the State to recover possession of certain wild forest lands, a stipulation is entered into between the parties settling the litigation, by which it is agreed that the defendants shall take judgment dismissing the complaint and adjudging them to be the owners of a certain portion of the land, and shall convey to the people certain tracts, a judgment entered in accordance with said stipulation is void and may be set aside because it attempts to dispose of lands belonging to the forest preserve, in violation of the State Constitution, article 7, section 7.

The vacating and setting aside of said judgment is not a bar to the right of the defendants to litigate the question of title.

One of the defendants who had complied with the stipulation was entitled, prior to the vacating of the judgment, to withdraw as a party defendant.

APPEAL by the defendants, Spencer G. Prime and John F. O'Brien, appearing specially, from an order of the Supreme Court made at the Montgomery Special Term and entered in the office of the clerk of the county of Essex on the 4th day of February, 1916, vacating and setting aside a stipulation and agreement heretofore made herein and the judgment heretofore entered in this action and declaring void and

canceling of record certain deeds, and also from an order entered in said clerk's office on the 21st day of March, 1916, resettling a prior order granting the motion of the defendant Chester B. McLaughlin and striking him from this action as a party defendant thereto.

Appeal by the plaintiff, The People of the State of New York, from the order entered on the 21st day of March, 1916, granting the motion of the defendant Chester B. McLaughlin.

Appeal by George A. Stevens, appearing specially, from the order above mentioned, entered in the office of the clerk of the county of Essex on the 4th day of February, 1916.

The appellants John F. O'Brien and George A. Stevens have acquired some interest in the subject-matter since the action was commenced.

George N. Ostrander, for the appellant George A. Stevens.

Egburt E. Woodbury, Attorney-General [*A. F. Jenks* and *B. H. Loucks* of counsel], for the plaintiff.

Patrick J. Tierney, for the defendants Prime and O'Brien.

Berne A. Pyrke, for the respondent McLaughlin.

WOODWARD, J.:

On October 7, 1904, the plaintiff instituted this action in ejectment to recover possession of 1,531 acres in lot 5 of the Whiteface Mountain tracts in North Elba, Essex county. The action was prosecuted in the name of the People by the then Forest, Fish and Game Commissioner, and the defendants answered by a general denial. On the 20th day of December, 1904, the parties entered into a stipulation settling the litigation. By this stipulation it was agreed that the defendants should take judgment dismissing the complaint and adjudging them to be the owners of 787 acres in the south part of the lot. It was agreed that the defendants should convey to the People the balance of the lot and the defendants were likewise to convey to the People certain other tracts of land in Essex county. An order and judgment in harmony with the stipulation was made and entered on the 14th of March, 1905, and the conveyances mentioned were made.

On the 21st of October, 1913, the defendant Chester B. McLaughlin executed a deed to John F. O'Brien and Spencer G. Prime whereby he undertook to convey his interest in the premises in the south part of the lot. This deed was duly recorded on the 15th of September, 1914, and several intervening conveyances were made, which it does not appear necessary to detail here.

On the 24th day of July, 1915, a motion was made to vacate and set aside the judgment and stipulation made in 1905, and this motion was granted by an order of October 9, 1915. Before this order was entered, an order was made on the application of the defendant McLaughlin to show cause why the said McLaughlin should not be permitted to withdraw as a party. Appeal comes to this court from both of these orders.

We are unable to discover any good reason for interfering with the order of the court dropping Mr. McLaughlin from the list of defendants. He has clearly estopped himself from asserting any rights in the premises, and has complied, so far as reasonably to be expected, with the conditions insisted upon by the Attorney-General as a condition of such order. The defendants appealing have no interest in having Mr. McLaughlin in the case, and it is purposeless to reverse the order.

The serious question involved is whether the judgment entered upon the stipulation in the action in 1904 should be set aside. And this question, in principle, appears to us to have been settled in *People v. Santa Clara Lumber Co.* (213 N. Y. 61). While that action was brought in equity, and there was an opportunity to contest the validity of the former judgment, the principles enunciated make it evident that the judgment here under consideration was void, as unauthorized by the Constitution, and the court undoubtedly had authority to set aside a void judgment under which parties were claiming rights and interfering with the rights of the State. A void judgment is no judgment (*Village of Fort Edward v. Fish*, 156 N. Y. 363, 371, 373), as no rights can arise from an undertaking prohibited by law, whether the contract is *malum in se* or *malum prohibitum*. (*Peck v. Burr*, 10 N. Y. 294, 299; *Village of Fort Edward v. Fish*, *supra*.)

App. Div.]

Third Department, May, 1917.

The stipulation, if it attempted to dispose of lands belonging to the forest preserve, was forbidden by the Constitution (Art. 7, § 7), and this illegality tainted the entire transaction, and the court in setting aside the judgment has merely left the parties where it found them. (*Unckles v. Colgate*, 148 N. Y. 529, 539.) There is no bar to their litigating the question of title. If the defendants in fact own the property they have just as good title now as they had in 1904. If they had no title then to any part of the premises they could not get it by a so-called compromise judgment, for the State had conclusively determined that the wild forest lands belonging to the State could not be alienated.

The orders appealed from should be affirmed.

Orders appealed from unanimously affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
LEROY T. BRADFORD, Appellant.

Third Department, May 2, 1917.

Conservation Law—violation of section 185—action to recover penalty for refusal to exhibit hunting license—pleading—complaint—failure to allege exception in statute.

A complaint in an action to recover a penalty for a violation by the defendant of section 185 of the Conservation Law, in refusing to exhibit his hunting license is insufficient, where it does not allege that the defendant was not one of the persons excepted by the statute from the duty of procuring a license.

As the statute limits the requirement for a license to persons who are not the owners or lessees of farm land and in possession of the same, if the defendant was in fact the owner or lessee of farm land on which he was hunting and in possession of the same, he was not bound to have the license at all and could not be subject to the penalty prescribed.

KELLOGG, P. J., and LYON, J., dissented.

APPEAL by the defendant, Leroy T. Bradford, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Fulton on the 31st day of October, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Frank Talbot, for the appellant.

Egburt E. Woodbury, Attorney-General [*William T. Moore*, Assistant Deputy Attorney-General, of counsel], for the respondent.

WOODWARD, J.:

This is an action to recover a penalty for a violation of the provisions of section 185 of the Conservation Law. (See Consol. Laws, chap. 65 [Laws of 1911, chap. 647], § 185, subd. 6, added by Laws of 1912, chap. 318, as amd. by Laws of 1913, chap. 508.) The complaint alleges on information and belief that "on or about the 18th day of October, 1915, the * * * defendant, * * * in the county of Fulton, State of New York, while hunting game animals or birds, did wrongfully and unlawfully refuse to exhibit his license, which had been previously issued to said defendant so to hunt, for inspection, to James Lampman, a person who then and there requested to see the said license, which refusal was contrary to the form of the statute in such case made and provided and contrary to and in violation of the provisions of the Conservation Law of the State of New York and the laws amendatory thereof and supplemental thereto, and that thereby the said defendant incurred and became liable to the plaintiffs for the penalty of sixty dollars," etc. The answer admits that the defendant refused to display his license to the person demanding to see it, and alleges affirmatively that the action cannot be maintained for the reason that in a certain criminal action or proceeding the defendant was subpoenaed and sworn as a witness, etc.

Whether this new matter, not alleged as a defense, was sufficient to defeat the action, if the evidence in support of the same had been submitted to the jury, it is unnecessary to determine. No objection to the form of the pleading appears to have been made, and we are of the opinion that the question of good faith on the part of the defendant and the magistrate before whom the criminal proceeding was held was for the jury, rather than for the court; but in the view we take of the case this is not important. At the opening of the case defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to con-

App. Div.]

Third Department, May, 1917.

stitute a cause of action. This motion was denied and the defendant took an exception, and we are of the opinion that this motion should have been granted.

Subdivision 1 of section 185 of the Conservation Law provides that "No person or persons shall at any time hunt, pursue or kill with a gun, any wild animals, fowl or birds or take with traps or other devices any fur bearing animals, or engage in hunting or trapping *except as herein provided*, without first having procured a license so to do," etc. Subdivision 6 provides that "no person to whom a license has been issued shall be entitled to hunt, pursue, kill or take game animals, fowl and birds or trap fur bearing animals in this state unless at the time of such hunting," etc., "he or she shall have such license on his or her person, and shall exhibit the same for inspection to any protector or other officer or other person requesting to see the same." If the statute had ended here, it may be that the plaintiff would have been entitled to recover upon its complaint, but the 8th subdivision of the same section provides that "the owner or owners of farm land, and their immediate family or families occupying and cultivating the same, or the lessee or lessees thereof and their immediate family or families who are actually occupying and cultivating the same, shall have the right to hunt, kill and take game or trap fur bearing animals on the farm land of which he or they are the *bona fide* owners or lessees," etc. This clause is an exception — exception noted in the 1st clause — to the general provisions of the statute, and in order to state a good cause of action it is necessary to show that the defendant was not the owner or lessee of farm land and in possession of the same. In stating a cause of action arising upon a statute it is an ancient rule that where an exception is incorporated in the body of the clause of a statute, he who pleads the clause ought to plead the exception. (*Rowell v. Janvrin*, 151 N. Y. 60, 66.) Here the statute clearly limits the requirement for a license to persons who are not the owners or lessees of farm land and in possession of the same, and if the defendant was in fact the owner or lessee of farm land on which he was hunting, and in possession of the same, he was not bound to have a license at all, and he could not be subject to the penalty

prescribed. It was necessary, as a condition precedent to the incurring of the penalty, that the defendant should require a license to hunt, and until this fact was alleged in the pleading the complaint did not state facts sufficient to constitute a cause of action, and the complaint should have been dismissed on defendant's motion.

The judgment and order appealed from should be reversed.

All concurred, except KELLOGG, P. J., and LYON, J., who dissented.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

JOSEPH SHARLET and PHILIP SHARLET, Respondents, v. THE
HANOVER FIRE INSURANCE COMPANY, Appellant.

Third Department, May 2, 1917.

Insurance — action on fire insurance policy — defense — fraud — discrepancy between itemized statement of loss and plaintiffs' inventory and sales book — verdict not against weight of evidence — instructions — question as to amount of recovery.

In an action to recover upon a standard fire insurance policy issued by the defendant, the defense of fraud was interposed and it was claimed that the itemized statement of the goods damaged and destroyed by the fire did not harmonize with the plaintiffs' inventory and sales book, nor with the inventory made by the defendant, but the evidence showed practically as many and as far-reaching errors against the plaintiffs' interests as against those of the defendant.

Held, that with the presumption in favor of honest and fair dealing, it cannot be said that the verdict in favor of the plaintiffs is against the weight of the evidence.

As the plaintiffs sued to recover only the defendant's portion of the total insurance, defendant's request that the jury be asked to determine the total amount of the loss, does not raise the question of amount of recovery, especially since there was no exception directly to the charge of the court that if the defense of fraud was not established the plaintiffs were entitled to the full amount of the policy.

APPEAL by the defendant, The Hanover Fire Insurance Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county

App. Div.]

Third Department, May, 1917.

of Rensselaer on the 23d day of December, 1915, upon the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of December, 1915, denying defendant's motion for a new trial made upon the minutes.

Ainsworth, Carlisle & Sullivan [John N. Carlisle of counsel], for the appellant.

Akin & Keenan [Clarence E. Akin of counsel], for the respondents.

WOODWARD, J.:

This action was brought to recover upon a standard fire insurance policy issued by the defendant. The defense interposed was fraud, and this was the issue tried and determined by the jury. It was claimed by the insurance company that the itemized statement of the goods damaged and destroyed by the fire, which occurred in the plaintiffs' clothing store in Troy, on the 8th day of February, 1915, did not harmonize with the plaintiffs' inventory and sales book, and that it did not correspond with the inventory made by the defendant, and it was claimed that this demonstrated such a fraud as to vitiate the contract of insurance. The jury returned a verdict in favor of the plaintiffs, and the defendant appeals from the judgment and from the order denying a motion for a new trial.

It is not to be doubted that the defendant produced evidence which the jury might have found to indicate fraud, but it is equally true that the plaintiffs furnished evidence which, if believed, warranted the conclusion that the transaction was free from fraud, and that the established discrepancies were due to honest errors. Indeed, the evidence showed practically as many and as far-reaching errors against the plaintiffs' interests as against those of the defendant, and, with the presumption in favor of honest and fair dealing, it cannot be said that the verdict of the jury is against the weight of evidence.

The case was submitted to the jury upon a charge to which there was no exception. After the charge was completed, counsel for the defendant made the suggestion that the jury ought to find a verdict as to the total amount of the loss,

and the court responded that while this was not really involved in the case, if counsel agreed, he would submit this question. There was objection on the part of the plaintiffs and the court refused to submit the question, and defendant took an exception. The plaintiffs sued this defendant to recover the sum of \$800, this being the defendant's portion of a total insurance of something over \$4,000, and the defendant's request was understood to be that the jury should be asked to determine the total amount of the loss, rather than confine itself to the question of the \$800 involved in the policy on which this action was brought. This, of course, was not the issue, and there was no exception directly to the charge of the court that if the defense of fraud was not established the plaintiffs were entitled to the full amount of the policy. We think this question of amount is not raised by this exception, and it is reasonably certain, if the plaintiffs were acting in good faith, that the evidence fairly warranted a recovery for the full amount of the policy.

The judgment and order appealed from should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

LEON LAWTON, Respondent, v. BERNARD J. FARRELL,
Appellant.

Third Department May 2, 1917.

Place of trial — action for false imprisonment arising in county outside of city of second class, where arrest made by city police officer — **Second Class Cities Law, section 242**, construed — said section does not contemplate repeal of section 983 of Code of Civil Procedure — constitutional law — right of trial in own county.

Where a police officer of a city of the second class served a warrant in a bastardy proceeding in another county, and was sued in said county for false imprisonment, the place of trial is governed by subdivision 2 of section 983 of the Code of Civil Procedure, and is not changed by the provisions of section 242 of the Second Class Cities Law so as to entitle said police officer to change the place of trial to his own county. This

App. Div.]

Third Department, May, 1917.

because (1) he was not acting as a policeman of the city in executing the warrant, and (2) the Second Class Cities Law did not contemplate a repeal of the provisions of the Code of Civil Procedure.

Section 1 of article 1 of the State Constitution would seem to guarantee the plaintiff in the action for false imprisonment the right of trial in his own county, which privilege belongs under the provisions of section 983 of the Code of Civil Procedure to citizens generally.

COCHRANE, J., and KELLOGG, P. J., dissented, in memorandum.

APPEAL by the defendant, Bernard J. Farrell, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Schoharie on the 31st day of October, 1916, denying his motion to change the place of trial herein from Schoharie county to Rensselaer county.

Thomas H. Guy, for the appellant.

Wallace H. Sidney, for the respondent.

WOODWARD, J.:

This is an action for false imprisonment, originating in the county of Schoharie, where the defendant served a warrant in a bastardy proceeding, and refused and neglected to permit the plaintiff an opportunity to give bail to a magistrate within Schoharie county, but insisted on taking the plaintiff to the city of Troy, where he was imprisoned until released by a writ of habeas corpus. This motion was made to change the place of trial on the ground that under the provisions of section 242 of the Second Class Cities Law (Consol. Laws, chap. 53; Laws of 1909, chap. 55) the defendant, who is a police officer of the city of Troy, is entitled to have the action tried in Rensselaer county. Section 242 provides generally that in judicial investigations the fact of residence within the city shall not disqualify judges, jurors, referees, etc., and then adds: "The place of trial of all actions and proceedings against the city, or any of its officers, boards or departments, shall be the county in which the city is situated;" and the defendant, who is concededly a police officer of the city of Troy, strenuously urges that he cannot be tried in Schoharie county.

But the defendant is mistaken in the law. Subdivision

2 of section 983 of the Code of Civil Procedure fixes the place of trial in a case of this character; no question is made of this, except as it is claimed to be changed by the provisions of section 242 of the Second Class Cities Law. There are two very conclusive reasons why the defendant is not entitled to the order which he seeks; one of them is that he was not acting as a policeman of the city of Troy in executing the warrant in Schoharie county. Section 142 of the Second Class Cities Law provides that the members of the police department, other than surgeons, in criminal matters have all the powers of peace officers under the general laws of the State, and provides certain other duties in respect to local ordinances; and this constitutes the duties which as policemen they are called upon to perform within the city. It then provides that they "shall also have, in every other part of the State, in criminal matters all the powers of constables and any warrant for search or arrest issued by any magistrate of the State may be executed by them in any part of the State according to the tenor thereof without indorsement." That is, outside the limits of the city they cease to be officers of the city, and are invested by the statute with the powers of constables in reference to criminal matters. Acting as a peace officer, outside the city, he is acting wholly in his personal capacity (*People ex rel. White v. Clinton*, 28 App. Div. 478, 479, and authorities there cited), and he does so under the same responsibilities as would attach to him were he a sheriff or a deputy sheriff or a constable.

The second reason is that the Second Class Cities Law did not contemplate a repeal of the provisions of the Code of Civil Procedure. Section 250 of the act provides for the construction of the same, and declares that the "provisions of this chapter have reference only to a city of the second class," and "shall be construed not as an act in derogation of the powers of the State but as one intended to aid the State in the execution of its duties, and shall be liberally construed so as to carry into effect the objects and purposes thereof," and then the following section provides that "Nothing contained in this chapter shall be construed to repeal any statute of the State or ordinance of the city or rule or regulation of the board of health, not inconsistent with the

App. Div.]

Third Department, May, 1917.

provisions of this chapter, and the same shall remain in full force and effect, when not inconsistent with the provisions of this chapter, to be construed and operated in harmony with its provisions." Obviously, where a police officer goes outside of the city and executes a warrant, under the authority given by section 142 of the Second Class Cities Law, there is no inconsistency in permitting the Code of Civil Procedure to govern in an action for false imprisonment originating in an adjacent county. If the act of false imprisonment had originated in the city of Troy, while the officer was engaged in performing some of his duties as a policeman, it may be that there would be ground for holding that he was entitled to the provisions of section 242 of the act, but we are clearly of the opinion that his character as an officer of the city of Troy does not accompany him outside of that jurisdiction; to the laws of Schoharie county he is a mere peace officer, subject to the same conditions which would prevail if he had been a deputy sheriff of Rensselaer county instead of a member of the police force of the city of Troy. No good reason suggests itself why the plaintiff, a citizen of Schoharie county, where the false imprisonment had its inception, should be denied the right of trial in his own county simply because the warrant was given to a policeman of the city of Troy for execution, rather than to a deputy sheriff, and the provisions of section 1 of article 1 of the State Constitution would seem to guarantee him this privilege which belongs under the provisions of section 983 of the Code of Civil Procedure to citizens generally.

The order appealed from should be affirmed, with costs.

All concurred, except COCHRANE, J., who dissented in a memorandum in which KELLOGG, P. J., concurred.

COCHRANE, J. (dissenting):

The defendant was unquestionably an officer of the city of Troy. In executing the warrant against the plaintiff he was acting as such officer and by virtue of his office. Therefore, under section 242 of the Second Class Cities Law (Consol. Laws, chap. 53; Laws of 1909, chap. 55) the defendant has a right to have the action tried in Rensselaer county. I disagree with Mr. Justice WOODWARD as to the effect of section 142 of the Second Class Cities Law. That section

describes and defines the powers which police officers have not only in their own city but "in every other part of the State." The section enlarges rather than restricts their powers. A police officer may as in this case go outside of his city and pursue with a warrant an offending citizen and apprehend him anywhere within the State. And in doing so he does not cease to be a policeman. And because section 142 gives him the powers of a constable outside his own city that does not make him any the less an officer of the city he is serving. In the very nature of things his duty as such an officer of the city must take him to different parts of the State for the purpose of apprehending the perpetrators of crimes committed within his city but who have passed beyond the limits thereof. In this instance the defendant was executing a warrant issued by a magistrate of his own city charging the plaintiff with an offense pertaining to that city and it seems to me he was clearly acting as a policeman of that city. If he was not an officer of that city of what division of the State was he an officer? It is stated in the prevailing opinion that he ceased to be an officer of the city and was vested by the statute with the powers of a constable, but as a constable he must have been an officer of some political subdivision of the State.

It seems to me that section 242 of the Second Class Cities Law repeals section 983 of the Code of Civil Procedure so far as the latter statute is inconsistent with the former. It is the policy of the law that the place of trial of all actions against the officers of a city of the second class arising out of their official acts shall be tried in the county in which such city is situated, and if the defendant is included within that provision of the law he is entitled to avail himself thereof even though those who perform corresponding duties but who are not officers of a second class city are not included within any corresponding statutory provision. The wisdom or reasonableness of the statute is a question for the Legislature and not for the courts.

KELLOGG, P. J., concurred.

Order affirmed, with ten dollars costs and disbursements.

App. Div.]

Third Department, May, 1917.

In the Matter of the Final Judicial Settlement of the Account of Proceedings of JOSEPH W. BEWSHER, as Sole Testamentary Trustee of and under the Last Will and Testament of WILLIAM H. WATSON, SR., Deceased.

ALBANY GUARDIAN SOCIETY AND HOME FOR THE FRIENDLESS, Appellant; FREDERICK C. WATSON, Individually and as Administrator, etc., of BERTHA C. WATSON, Deceased, and Others, Respondents.

Third Department, May 2, 1917.

Decedent's estate — trust — gift to charitable institution under will executed less than two months prior to death.

Where a testator made and executed a will less than two months prior to his death, by which after making a specific bequest and devise to his son, he gave the remainder of his property in trust to pay one-half of the income to his son for life, and the other half to the wife of said son, and further provided that upon the death of either the entire income was to go to the survivor for life, with the further right to dispose of the entire estate by will, and in default of such disposition the trustee was to hold the estate in trust and pay the entire principal sum and all unexpended income to a charitable institution, said attempted gift, the power of appointment not having been exercised, is invalid under section 6 of chapter 319 of the Laws of 1848, as amended by chapter 623 of the Laws of 1903, although said institution was to take only in the more or less remote possibility of the property not being disposed of pursuant to the will.

COCHRANE, J., dissented, with opinion.

APPEAL by the Albany Guardian Society and Home for the Friendless from so much of a decree of the Surrogate's Court of the county of Albany, entered in the office of said Surrogate's Court on the 27th day of November, 1916, as directs the testamentary trustee to transfer and pay over to Frederick C. Watson, as administrator, certain moneys.

A. Page Smith, for the appellant.

Keeshan & Sleicher [*Frank R. Keeshan* of counsel], for the respondent Watson.

WOODWARD, J.:

William H. Watson, Sr., died on the 1st of May, 1907, a resident of the county of Albany, leaving a last will

and testament, executed on April 12, 1907, which was duly admitted to probate on the 8th day of May, 1907, on which day letters testamentary were duly issued to Joseph W. Bewsher who qualified and is still acting as executor. By the terms of said last will and testament the testator made a specific bequest to his son, William H. Watson, Jr., and devised a certain piece of real estate to the same son, and gave the remainder of his property to his executor in trust, to pay over the income of one-half of such property to his son during his natural life, and the other half to the wife of said son, and upon the death of either the entire income was to go to the survivor for life, with the further provision that the survivor might dispose of the entire estate by will. In default of such a disposition on the part of the survivor the will provided that the trustee was to hold the same in trust to pay over the entire principal sum, and all unexpended income therefrom, to the Albany Guardian Society and Home for the Friendless, commonly called The Old Woman's Home, a charitable institution, located and having a place of business on Clinton avenue, in the city of Albany, for it to have and to hold the same forever. The will likewise provided that the executor should be authorized, in his discretion, to encroach upon the corpus of the estate, to provide for the son and his wife in a suitable manner in sickness or in health; so that it is evident that the testator had in mind the vesting of the beneficial enjoyment of his estate in his son and his son's wife, or the survivor of them, with a proviso which enabled the survivor to continue it to the use of his or her heirs, or to others, if so minded, and that the Albany Guardian Society and Home for the Friendless was to take only in the more or less remote possibility of the property not being thus disposed of.

William H. Watson, Sr., was survived by his son, and by the son's wife, and during the lives of both the trust was concededly administered according to the terms of the will. The son died a resident of Albany county on the 13th day of May, 1913, leaving a last will and testament, by the provisions of which his entire estate vested in his widow, Bertha C. Watson. William H. Watson, Jr., was survived by a son by a former wife who had been divorced. Bertha C. Watson, the survivor in the trust, died without making any use of the

App. Div.]

Third Department, May, 1917.

power of appointment under the will of William H. Watson, Sr., and the son of William H. Watson, Jr., as administrator of her estate, has procured a decree from the Surrogate's Court of Albany county directing that the corpus of the trust estate, remaining in the hands of the trustee, be turned over to him as such administrator, and he is now in the possession of such fund, the decree holding that the attempted trust in favor of the Albany Guardian Society and Home for the Friendless was void because of the fact that the will under which this attempted gift was made was executed less than two months preceding the death of William H. Watson, Sr., and that it could not, under section 6 of chapter 319 of the Laws of 1848, as amended by chapter 623 of the Laws of 1903, be a valid disposition of the property to such corporation.

The appellant has a theory that because it was not the intention of the testator to make this gift to the Albany Guardian Society and Home for the Friendless except in a rather remote contingency, and that it was not to take effect upon the death of the survivor, there was something in the will which took the case out of the provisions of the statute. Just what that something is does not fully appear to us. It is certain that if any right passed by the will it did so at the time of testator's death, however subject it may have been to defeat through the happening of the contingencies mentioned in the instrument. The will operated to make a gift at the time of the death of the testator, or it had no effect whatever; whatever right the appellant had was fixed by the will upon its becoming operative, and if it was invalid at that time no lapse of time could make it valid. (Broom Leg. Max. [8th Am. ed.] 177.) The Albany Guardian Society was organized under the provisions of chapter 319 of the Laws of 1848, and section 6 of this act, as amended by chapter 623 of the Laws of 1903, provided that "Any corporation formed under this act, shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will and testament of any person whatsoever; provided, no person leaving a wife or child or parent, shall devise or bequeath to such institution or corporation more than one-half of his or her estate, after the payment of his or her debts, and such devise or bequest

shall be valid to the extent of such one-half, and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator." It is conceded that William H. Watson, Sr., died in less than two months from the making and executing of this will, so that under the letter of the statute the bequest was invalid at the death of the testator. That which is invalid is void, and that which is void is no thing; it is the same as though it had never had any form. (*Village of Fort Edward v. Fish*, 156 N. Y. 363, 371, 374.)

We are of the opinion that the trustee took the estate in trust for the benefit of William H. Watson, Jr., and his wife, and that when the survivor died, without exercising the power of disposition, the trust was at an end for all purposes. No part of the estate vested in the Albany Guardian Society at the death of William H. Watson, Sr., and, of course, it passed to his heir at law, subject to the trust, which has been executed. The heir at law passed his interest along to his widow by will, and it thus became a part of her estate.

The decree appealed from should be affirmed, with costs.

All concurred, except COCHRANE, J., who dissented, with opinion.

COCHRANE, J. (dissenting):

The language of the statute (Laws of 1848, chap. 319, § 6, as amd. by Laws of 1903, chap. 623) is that any corporation formed under the act may take property "by virtue of any devise or bequest" contained in a last will and testament, but that "no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator."

It is only in a limited and restricted sense that the appellant claims title to the fund in question solely "by virtue of" the bequest in the will of William H. Watson, Sr., or that the claim of the appellant rests exclusively on a "bequest" under that will. In a larger and more comprehensive sense the claim of the appellant exists not only "by virtue of" the bequest in the will but also by virtue of the fact that Bertha C. Watson has not executed the power given her by that will. There would be no doubt that if she had exercised such power

in favor of this appellant, such exercise of power would have been valid and the appellant would have good title to the fund in question. Its title in such case would depend both on the provisions of the will of William H. Watson, Sr., and also on the exercise by Bertha C. Watson of the power conferred on her by said will. The two elements would combine to give good title to this appellant. So on the other hand it seems to me that Bertha C. Watson having failed to execute such power, such failure on her part must likewise be considered as an element in determining the title to this fund. Such title depends not exclusively on the provisions of the will but also on what Bertha C. Watson has done or omitted to do in connection with the power granted her by the will. It is not alone the will of the testator but also the will of Bertha C. Watson to execute or not to execute the power conferred on her which determines this question. It does not seem to me that this reasoning is abstruse when it is considered that the statute is a somewhat arbitrary interference with the right of the testator to dispose of his property as he pleases, and that under the circumstances here disclosed the claim of the appellant is in clear conformity with the wishes and intent of the testator. I think this case does not fairly come within the prohibition of the statute.

Decree affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of WILLIAM T. CHARLTON, Respondent, for Compensation under the Workmen's Compensation Law, v. THE HILTON-DODGE TRANSPORTATION COMPANY, Employer, Appellant.

Third Department, May 2, 1917.

Workmen's Compensation Law — application to foreign corporation engaged in interstate commerce — injury to engineer of tug owned by foreign corporation.

A resident of this State employed as chief engineer of a tug owned by a corporation having its principal place of business in the State of Georgia but enrolled or registered in the custom house in the port of New York,

and engaged in interstate commerce between Atlantic ports, is not entitled to the benefit of the Workmen's Compensation Law for injuries sustained while on Long Island sound, *en route* between Portland, Me., and New York city.

The Workmen's Compensation Law does not undertake to charge corporations of a sister State or of a foreign government carrying on interstate or foreign commerce with the burdens thereof.

KELLOGG, P. J., and LYON, J., dissented, with opinion.

APPEAL by the defendant, The Hilton-Dodge Transportation Company, from an award of the State Industrial Commission, entered in the office of said Commission on the 11th day of September, 1916.

James A. C. Johnson, for the appellant.

Egburt E. Woodbury, Attorney-General, and *Robert W. Bonyne*, counsel to State Industrial Commission [*Robert H. Grimes*, assistant counsel to State Industrial Commission, of counsel], for the respondents.

WOODWARD, J.:

There is no dispute as to the facts in this case. The Hilton-Dodge Transportation Company is a Georgia corporation, with its principal place of business in Savannah. Its business is the transportation of lumber between Atlantic ports from Philadelphia to Portland, Me. Among its vessels was the tug *W. B. Keene*, which was enrolled or registered in the custom house in the port of New York, and had painted upon its stern the words "W. B. Keene, New York, N. Y." On the 25th of March, 1916, while said tug was *en route* between Portland, Me., and New York, N. Y., an accident occurred which resulted in injuries to the right hand of William T. Charlton, chief engineer of the tug. The accident occurred while the tug was off New London, Conn., on Long Island Sound, and while the tug was engaged in interstate commerce. Mr. Charlton is a resident of Brooklyn, N. Y., and was hired in the port of New York. The question presented upon this appeal is whether the injuries are subject to compensation under the provisions of the Workmen's Compensation Law of the State of New York.

The State Industrial Commission has held that the injuries are such as could be compensated under the laws of this State, and the appellant challenges this ruling.

Group 8 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides for the compensation of persons injured in the "operation, within or without the State, including repair, of vessels other than vessels of other States or countries used in interstate or foreign commerce, when operated or repaired by the company," and the respondent urges that this is sufficient to justify the award; that the mere fact that the owner of the vessel resides in Georgia is not sufficient to take the case out of the operation of the statute. We are of the opinion, however, that the award may not be sustained; that the whole statute is to be read and construed, and that it does not undertake to charge corporations of a sister State, or of a foreign government, carrying on interstate or foreign commerce, with the burdens of this act.

The language of group 8 of section 2, it should be observed, does not hinge entirely upon the question of the "vessels of other States or countries;" it is the fact that the "vessels of other States or countries" are "used in interstate or foreign commerce," which excepts them from the operation of the group. The vessels of any State or country, engaged in intrastate commerce, are unquestionably included in the group; the fact that in the conduct of such intrastate commerce they might pass outside of territorial waters of the State would make no difference. If, however, they were engaged in interstate commerce then the clear language of the statute excludes them from its operations. It is the "operation, within or without the State, * * * of vessels other than vessels of other States or countries used in interstate or foreign commerce" which is declared to constitute a hazardous employment, and when any vessel of another State or country is shown to have been engaged in interstate or foreign commerce it is clearly beyond the jurisdiction of the Industrial Commission of the State of New York to impose a burden such as is contemplated by the Workmen's Compensation Law. It is the operation of vessels in intrastate commerce, whether these vessels are of foreign or domestic ownership, that gives

legitimate jurisdiction for the operation of the legislation of this State upon employees operating such vessels, and the effort to make it cover the present case cannot find support in this court.

That the above is the true construction of group 8 is clear when we come to consider the provisions of section 114, for it is not to be doubted that this is a limitation upon this group. It provides that the "provisions of this chapter shall apply to employers and employees engaged in intrastate * * * commerce * * * only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce," with a like provision for those engaged in interstate or foreign commerce "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States." It is only when the employer and employee are mutually connected with intrastate work in such a manner that it may be clearly separable and distinguishable from interstate or foreign commerce that the chapter is to have effect, "except that such employer and his employees working only in this State may, subject to the approval and in the manner provided by the Commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

In other words, the Workmen's Compensation Law does not undertake to usurp the powers of Congress, or to legislate for persons or corporations not within its jurisdiction. For those engaged in intrastate commerce in vessels, whether within or without the State, it provides for compensating employees, but it is careful to exclude all matters of interstate commerce, except under conditions which cannot offend against the laws of Congress; and the State Industrial Commission has no power to go beyond the limits fixed by the statute.

The award appealed from should be reversed.

All concurred, except KELLOGG, P. J., who dissented, with opinion, in which LYON, J., concurred.

KELLOGG, P. J. (dissenting):

The Workmen's Compensation Law substantially enters into every contract of employment made within the State, without reference to where the service is to be rendered. (*Matter of Post v. Burger & Gohlke*, 216 N. Y. 544.)

The injured employee resides in this State, was hired and paid here, and has the benefit of that law, which, as we have seen, is a part of his contract of employment. By group 8 of section 2 of the law; "The operation, within or without the State, including repair, of vessels other than vessels of other States or countries used in interstate or foreign commerce, when operated or repaired by the company," is a hazardous employment.

The vessel in question was registered at New York, and that was her home port. Section 4141 of the United States Revised Statutes requires vessels to be registered "by the collector of that collection-district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, * * * usually resides." The name of the vessel and the "home port" must be marked upon the stern. (U. S. R. S. § 4178.) By our Navigation Law (§ 19) the vessel is to have the name and "the port to which she belongs painted on her stern." The transportation company, the alleged owner, was a foreign corporation, with its office at Savannah, Ga. It also had a New York office and was engaged in interstate transportation from New York south and New York north, and at the time of the accident the vessel was making the return trip from Portland to New York. But the law required that she be registered in the district in which she belonged, which is deemed that nearest to where the owner resides. Quite probably the corporation, while in effect transacting its principal business from New York, had a Georgia charter, and for that reason was required to keep an office in that State. By section 4137 of the United States Revised Statutes, registration of a boat belonging to a corporation may be in the name of the president or secretary. I think we are justified in concluding that the company is not in a position to deny that the vessel is properly registered in New York or that New York is in fact the residence of the

party to whom registration was granted. It is not very material where the technical residence of the real owner was. We may assume, as the company did when it registered the vessel, that it belonged to New York, and such assumption is well within the favorable presumption of the Workmen's Compensation Law.

If the vessel was taxable in Georgia, as indicated by *Southern Pacific Co. v. Kentucky* (222 U. S. 63) that is not very important. This is not a case of taxation, but the question is whether, in interpreting the Workmen's Compensation Law of this State, the vessel was a vessel of another State or country, and we conclude that the Commission was justified in saying that it was not.

Section 114 of the Workmen's Compensation Law is construed as removing from the other provisions of the law only cases which are covered by the Federal statutes. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 id. 284; *Matter of Burns v. Southern Pacific Co.*, 215 id. 738.) The Federal Employers' Liability Act has no application here, as no negligence is shown, and it is not alleged that there is any Federal statute covering the case of a workman who seeks compensation for an injury caused without fault of the employer. I, therefore, favor an affirmance.

LYON, J., concurred.

Award reversed and claim dismissed.

App. Div.]

Third Department, May, 1917.

CORNELIUS F. TIERNEY, Respondent, v. GEORGE W. PERKINS,
as President of the CIGARMAKERS' INTERNATIONAL UNION
OF AMERICA, Appellant.

Third Department, May 2, 1917.

Cigarmakers' International Union of America — action by surviving husband of member to recover benefit — evidence — when husband not dependent on wife — husband not relative of wife — appeal — judgment must be sustained on theory presented in court below.

Action by the plaintiff against the president of the Cigarmakers' International Union of America to recover under the constitution of said union the amount of the funeral and death benefit to which the beneficiary of his deceased wife, a member of said union, would be entitled, on the theory that he as surviving husband was dependent upon his wife in some degree for his support. Evidence examined, and *held*, insufficient to sustain such a theory, and that a judgment in favor of the plaintiff should be reversed.

A husband in the full possession of his faculties, earning a livelihood for himself and wife, and with her assistance preparing fowls for customers and keeping trifling accounts, is in no legal sense dependent upon her.

A husband is not a relative of his wife. They are merged in one during life, and upon the death of either the survivor cannot bear any relationship to the decedent.

A judgment on appeal must be supported, if at all, upon the theory on which it was rendered.

KELLOGG, P. J., and LYON, J., dissented, with opinion.

APPEAL by the defendant, George W. Perkins, as president, from an order of the County Court of Albany county, entered in the office of the clerk of said county on the 6th day of January, 1917, affirming a judgment of the City Court of Albany, and also from the judgment entered in said clerk's office on the same day pursuant to said order.

Mills & Mills [Borden H. Mills of counsel], for the appellant.

John J. McManus, for the respondent.

WOODWARD, J.:

The complaint alleges that the plaintiff is a resident of Albany county, and that the defendant is the president of the Cigarmakers' International Union, an unincorporated

association, etc., and that there are local unions of this organization in the city of Albany, and that Mary E. Tierney, at the time of her death, was a member in good standing of Local Union No. 68. It further alleges that under the provisions of sections 143, 144 and 144c of the constitution of the Cigarmakers' International Union of America, members in good standing at the time of their death were entitled to certain funeral and death benefits, and that under the provisions of section 144c, if no beneficiary was designated by such member, "such benefits shall be paid to the widow of such deceased member; if there be no widow, then to the minor children of such deceased member; and if there be no widow and no minor children of such deceased member, then to any relatives of the deceased member who at the time of his death were dependent for support in whole or in part upon such deceased member." The complaint then alleges the death of Mary E. Tierney, at the city of Albany, "leaving her surviving her husband, Cornelius F. Tierney, plaintiff in this action, and without leaving any descendants her surviving." It is alleged that said Mary E. Tierney did not in her lifetime make any designation of a beneficiary; that she left no property or estate, "except the death and funeral benefit accruing from the said Cigarmakers' International Union of America," and that the plaintiff has become liable for the funeral expenses, and that "the plaintiff is a relative of said Mary E. Tierney, to wit, her surviving husband; and that at the time of the death of the said Mary E. Tierney, plaintiff was dependent for support, in part, upon the said Mary E. Tierney; that plaintiff is a workingman and is not now, nor has he ever been, possessed of wealth or independent means," and he alleges that during their married life the decedent acted as his housekeeper, and that by her services in this capacity she contributed materially to plaintiff's support, and that they were mutually dependent upon each other for their support and maintenance; that "by the laws of the State of New York in force at the time of the death of said Mary E. Tierney, plaintiff was entitled to the said services of his said wife, rendered in his said household as aforesaid, without paying any compensation therefor; that plaintiff was the only relative of said Mary E. Tierney, dependent for support,

App. Div.]

Third Department, May, 1917.

either in whole or in part, upon said Mary E. Tierney at or before the time of her death." The complaint then makes the allegations as to his proofs of death, etc., and demands judgment for \$550, the amount of the funeral and death benefit to which her beneficiary would be entitled.

There is here no suggestion that there was ever any other constitution than that set forth in the complaint, and, judging from the evidence, the case went to the jury upon the theory that the plaintiff, as the surviving husband of Mary E. Tierney, was dependent upon her in some degree for his support; a large part of the testimony was devoted to showing that the said Mary E. Tierney helped her husband in some measure in the carrying on of his business as a peddler of garden produce, and the only fair construction of the evidence showed conclusively that the plaintiff, so far from being dependent upon his wife for support, was the sole support of himself and wife, with such incidental help in the way of dressing fowls for customers and in keeping his small accounts as the wife of a relatively poor man would naturally be expected to afford, and which he tells us in his complaint he was entitled to without compensation. The judgment in the City Court was clearly predicated upon this evidence, and upon appeal to the County Court this judgment was affirmed.

The plaintiff, the respondent on this appeal, now urges that the constitution of the Cigarmakers' International Union of America was amended in 1912 so that it excluded heirs at law as beneficiaries, and that this was such a violation of the obligation of the contract as to make the amendment void as to this plaintiff. It is hardly necessary to consider whether such amendment in any manner affected the plaintiff as the surviving husband for the reason that no such issue was tendered in the courts below; the plaintiff pleaded the constitution as it now is and claimed the right to recover as the only surviving relative who was in any degree dependent upon the decedent. Having recovered upon that theory, the judgment must be supported, if at all, upon the theory on which it was rendered, and this obviously may not be done. In a general sense, of course, we are all dependent upon each other; our peace, health, comfort and safety depend, in a measure, upon the acts of others, but to suggest that a

husband, in the full possession of his faculties, earning a livelihood for himself and his wife, with those incidental helps which a dutiful wife would render in the way of aiding in the preparing of fowls for customers, or keeping his trifling accounts, is in any legal sense dependent upon his wife, is absurd. "Trivial or casual, or perhaps wholly charitable assistance, would not create a relation of dependency, within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support, or maintenance, or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral, or legal, or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member." (*Wilber v. New England Order of Protection*, 192 Mass. 477, 479, and authority there cited.) There is not a thing in the evidence to show that the plaintiff in this action was in any degree less able to care for himself than he was to care for himself and wife with her assistance, so that if we assume a surviving husband to be a relative within the meaning of the constitution here under consideration he was not entitled to the death benefit, and the defendant had already offered to pay the funeral benefit.

Of course, a husband is not a relative of his wife. (*Esty v. Clark*, 101 Mass. 36; *Lavigne v. Ligue des Patriotes*, 178 id. 25, 29; *Gallagher v. Crooks*, 132 N. Y. 338, 343.) They are merged in one during life (*Esty v. Clark*, *supra*, 39, and authority there cited), and upon the death of either the survivor cannot, of course, bear any relationship to the deceased. The constitution here under consideration made provision, not for a surviving husband, but for a surviving widow, and the suggestion is made that under our Statute of Distributions a surviving husband is treated the same as a widow; but this does not give us any authority for reading into this constitution, designed for a national association, the special provisions of the statute law of New York. The instrument under which the plaintiff made his claim provided for making the payment to the widow, and a widow, in technical as well as ordinary use, has reference to a woman who has lost her husband by death. (30 Am. & Eng. Ency. of Law [2d ed.],

520.) It was squarely held in *Wellington v. Drummer* (69 N. H. 295) that "widow" did not include "widower," and it is to be observed that our Statute of Distributions does not attempt to make the words synonymous, but merely provides that the "husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more." (Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 100.) The plaintiff was, therefore, not entitled to the death benefit upon any possible construction of the word "widow;" he was not dependent upon his wife in any legal sense, and it is very doubtful whether he would be entitled to anything under the constitution as it is alleged to have been prior to the amendment. However this may be, the pleadings sought to recover under the constitution as it is, and the recovery must be sustained upon that basis or not at all, for judgments must be founded upon pleadings and proofs, and the pleadings and proofs now before us all go to the theory that the plaintiff is to be given the death benefit upon the ground that his wife was contributing to his support, and this is not sustained by any reasonable construction of the evidence.

The judgments and order appealed from should be reversed, with costs.

All concurred, except KELLOGG, P. J., who dissented in memorandum, in which LYON, J., concurred.

KELLOGG, P. J. (dissenting):

The death benefits are not intended solely for those dependent upon a member. The member may designate as beneficiary any person, even a stranger, by a proper paper filed with the association, or by will. Evidently the intention is, if the member has not designated a person to whom the payment is to be made, that it shall be (1) to the surviving spouse of a member, if any; (2) to the minor children, if any; (3) to dependent relatives, if any. If there is no surviving spouse, minor children or dependent relatives, the benefit is forfeited to the association.

It is manifest that the constitution, when adopted, did not

contemplate that women should be members. Perhaps at that time women were not engaged in cigarmaking. In any event the constitution, so far as it is called to our attention, treats all the members as males. The provision as to benefits (§§ 143, 144, 144c), referring to the member, uses the pronoun "his," and the retiring card issued to the decedent provides that should "he" return to active membership, the card will entitle "him" to be admitted. If the constitution contemplated that women are to be members of the union, it necessarily implied that the references to the male covered a like situation as to the female.

The wife of a member might be wealthy and might, in fact, be supporting her husband at the time of his death; but from the fact that she was his wife she is entitled to the benefit, if no designation is made. She gets the benefit, not as a dependent, because it is immaterial whether she is dependent or not, but as the person standing nearest to the deceased member, the person whom he probably would have selected if he had made a designation. I think that according to the true spirit of the constitution the word "widow" should be interpreted as "widow or widower."

Under section 143 of the by-laws the union became liable to pay death benefits in this case, the decedent having paid her dues for a great many years. But it seeks to avoid the payment by claiming that by her failure to make a designation the benefits are forfeited to the union. The union made the by-laws, and they should be most strictly construed against it, especially when it is urging a forfeiture.

It cannot consistently claim that any inequality was intended between its male and female members. The object and strength of the union is the equal protection to all of its members, without discrimination. The same reason which would give the benefits earned by a husband to the widow would give the benefits earned by the wife to the widower.

The constitution, in words, speaks of men only, and when by general language it imposes a duty or accords a right to them, it must necessarily follow that when women are received into the membership they are charged with the same duties and have the same rights as are given to men by the general language used. We are not interpreting the word "widow"

App. Div.]

Third Department, May, 1917.

as used in the statutes of the State, or in ordinary contracts, but are construing the constitution of a brotherhood which admits women as members but in its constitution speaks of all members as men. If the constitution permitted each member to invite his wife to certain functions, it cannot be claimed that a female member could not invite her husband. The right to participate in the function is not based upon sex, but is based upon the relation which the party bears to a member. If a member were entitled to funeral benefits in case his wife died, a woman would manifestly be entitled to the same benefit if her husband died; otherwise there would be an unjust discrimination in violation of the very spirit of the union. Within a spirit of fairness to all members, such a clause should be interpreted as giving to a member, male or female, the funeral benefit to help him in burying his deceased life partner. I favor an affirmance.

LYON, J., concurred.

Judgments and order reversed, with costs. The court disapproves of the finding that the plaintiff was a dependent relative of the deceased member who at the time of her death was dependent in whole or in part upon her.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of HARRIETTE LA FLEUR, Respondent, for Compensation to Herself under the Workmen's Compensation Law, for the Death of Her Husband, HENRY LA FLEUR, v. G. M. WOOD, JR., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants.

Third Department, May 2, 1917.

Workmen's Compensation Law — injury to right side resulting in acute pericarditis — evidence — when findings of State Industrial Commission conclusive — appeal — when Appellate Division permitted to interfere.

An employee of one conducting the business of erecting silos fell into a well hole in such a manner as to strike against a center pole used in the construction of a silo, producing a contusion of his right side, and subse-

quently developed acute pericarditis with a serofibrinous exudate, resulting in his death. Evidence examined, and *held*, that the conclusion of fact by the State Industrial Commission that death resulted from the injuries sustained, should be affirmed.

Where there is any evidence fairly calculated to establish the essential facts, the policy of the law requires that the finding of the State Industrial Commission shall be supported.

The Appellate Division is not permitted in such a case to consider the weight of evidence in the ordinary sense, for it is only when there is no evidence of probative force that it is permitted to interfere.

APPEAL by the defendants, G. M. Wood, Jr., and another, from an award of the State Industrial Commission, made on the 14th day of March, 1916.

Robert M. McCormick and Bond & Schoeneck [*Edward Schoeneck* of counsel], for the appellants.

Egburt E. Woodbury, Attorney-General, and *Robert W. Bonyng*, counsel to State Industrial Commission [*Harold J. Hinman, Deputy Attorney-General*, of counsel], for the State Industrial Commission, respondent.

Thomas Burns, for the claimant, respondent.

WOODWARD, J.:

The State Industrial Commission has awarded compensation to the widow of Henry La Fleur, who is alleged to have died from injuries received while in the employ of G. M. Wood, Jr., who was conducting the business of erecting silos. There are no disputed questions in respect to the nature of the employment, or the fact of liability, except that it is contended by the appellants that the evidence fails to show that the death grew out of the injuries. This question depends upon some highly technical testimony of physicians called in behalf of both parties, and while it must be confessed that it is not entirely satisfactory we are of the opinion that it was such as would have demanded a submission of the question to a jury, and the conclusion of fact found by the State Industrial Commission is made conclusive by statute. (*Matter of Dale v. Saunders Brothers*, 218 N. Y. 59, 63.) In *Matter of Collins v. Brooklyn Union Gas Co.* (171 App. Div. 381) and kindred cases, it has been held that there must be evidence of some degree of probative force to support an

award; but where there is any evidence fairly calculated to establish the essential facts, the policy of the law requires that the finding shall be supported, and that the compensation shall be paid. (*Matter of Moore v. Lehigh Valley Railroad Co.*, 169 App. Div. 177, 187, and authority there cited.)

In the case now before us the decedent fell into a well hole in such a manner as to strike against a center pole, used in the construction of a silo, producing a more or less serious contusion of his right side immediately below the nipple. He continued to work from June 19, 1915, the day of the injury, up to the ninth day of July following when he was unable to continue. He had had medical attention on the day following the injury, and was bandaged upon the theory that some of his ribs were broken, and at different times he was advised by his physician to quit work, but he continued as above stated until the ninth of July when he was confined to his home, and soon afterward developed what the doctor diagnosed as bronchitis, but which subsequently was found to be acute pericarditis with a serofibrinous exudate, causing his death on the 16th day of July, 1915.

There was a decided conflict in the evidence, and, from the record as it reaches us, there is much reason to doubt if a jury would have been justified in finding in favor of the claimant's theory upon the evidence produced; it is quite likely that in an action based upon negligence this court would feel called upon to reverse the judgment as against the weight of evidence, but we are not permitted to consider the weight of evidence in the ordinary sense, for it is only when there is no evidence of probative force that we are permitted to interfere. Here there is evidence, which seems to be in harmony with the medical authorities, to the effect that the accident was a sufficient producing cause of the acute pericarditis, with its accompanying conditions; that the bruising of the chest on the right side was sufficient to produce a traumatic injury to the membrane surrounding the heart, and in this way bring about the ultimate death. That the doctors disagree about this, and that it is difficult to harmonize the theories even of those who testify in support of the award, is most true, but the State Industrial Commission were not bound to accept the theories of any of the witnesses; they

were there to try the facts, and if they could spell out from the evidence a theory in harmony with the facts which gave a reasonable foundation for the award, it was proper this should be done. It cannot be said as a matter of law that there was not such evidence in this case.

The appellants' case was presented here with unusual subtlety and force, and the argument has compelled careful attention on the part of the court, but we are forced to conclude that the award should be affirmed.

Award unanimously affirmed.

MARY A. BERGEN, Respondent, v. MORTON AMUSEMENT COMPANY, INC., Appellant, Impleaded with CHARLES SHAFFER and EDWARD SHAFFER, Respondents, and THOMAS L. SALTARELLI, Defendant.

Fourth Department, May 2, 1917.

Negligence — personal injuries caused by excavation — failure to provide lateral support — evidence justifying recovery — municipal corporations — ordinances of city of Buffalo requiring protection of excavation by sheetpiling — common-law rights of lateral support — when landowner cannot escape liability by employing independent contractor — tenant may recover damages resulting from failure to provide lateral support.

Action to recover damages for personal injuries. The defendant, a landowner in the city of Buffalo, was engaged in the construction of a theatre and had excavated over eleven feet perpendicularly below the curb line on the boundaries of its lot adjacent to a cement sidewalk which gave access to premises of which the plaintiff was a tenant. Although the ordinances of the city of Buffalo require any person intending to excavate to notify the owner of adjoining premises and also to support the adjoining land with sheetpiling where the excavation goes to a greater depth than four feet, neither the defendant nor its contractor had in any way complied with these ordinances with the result that, while the plaintiff was passing over the cement walk, it gave way owing to a cave-in underneath the walk of the soil adjacent to the excavation into the excavation caused by prior heavy rains, and she fell into the excavation. Evidence examined, and held, sufficient to charge the defendant and its contractor, as codefendant, with sufficient notice of the dangerous condition of the excavation

App. Div.]

Fourth Department, May, 1917.

and that they should have taken means to avert the danger if they had exercised reasonable care so that defendants' negligence was properly submitted to the jury.

In such action it was proper to charge in substance that the jury might base the defendants' negligence upon their failure to protect the excavation with sheetpiling as required by the municipal ordinance.

However, even if it were error to receive said ordinance in evidence, a verdict for the plaintiff was justified by the other evidence.

The plaintiff as tenant of the adjoining building had a right of lateral support, and under the circumstances the defendants may be held liable for their failure to furnish such support.

It seems, that the right of lateral support does not include the right of the support of an adjoining building which increases the lateral thrust, which latter right can only be acquired in this State by grant or covenant, express or implied, although in England it may be acquired by prescription.

By common law a landowner who by excavating removes the lateral support from adjoining land takes the risk of resulting damages however careful he may be, and he cannot, by delegating the work of excavation to another, escape liability for such damages.

The plaintiff as tenant of the adjoining building and having right of access thereto over the cement sidewalk is entitled, personally, to recover damages, which are not confined to those suffered by her landlord.

Although at common law in the absence of a covenant there is no right of lateral support where an increased weight is placed upon the soil by buildings, there is a right of lateral support for the additional burden imposed by a small sidewalk and by the weight of a human being walking thereon.

The common council of the city of Buffalo were authorized to enact as a valid regulation the ordinance requiring such excavations to be guarded by sheetpiling. This, under subdivision 5 of section 17 of the charter empowering it to prescribe general regulations for the erection of all buildings, and also under subdivision 11 of section 17, the general welfare clause conferring police powers. Such ordinance did not attempt to abrogate a settled rule of the common law but on the contrary to enforce such rule.

Nature of the right of lateral support stated and cases analyzed, *per* DE ANGELIS, J.

APPEAL by the defendants, Morton Amusement Company, Inc., and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 25th day of May, 1916, upon the verdict of a jury for \$1,500.

The appellant appeals from the whole of said judgment

including the part thereof which dismissed the complaint upon the merits as against the defendants, Charles Shaffer and another, and also from an order entered in said clerk's office on the 30th day of June, 1916, denying their motion for a new trial made upon the minutes.

Elijah W. Holt and William J. Hickey, for the appellant.

Carl Sherman, for the respondent Bergen.

Charles F. Boine, for the respondents Shaffer.

DE ANGELIS, J.:

The appeal as against the defendants Shaffer is dismissed by consent.

The action is for personal injuries due to the alleged negligence of the defendants.

The defendant Morton Amusement Company, Inc., was the owner of a lot of land situated on the northerly side of Connecticut street, a short distance west of Sixteenth street, in the city of Buffalo, and was engaged in building a moving picture theatre thereon at the time of the accident hereinafter referred to. The defendant Thomas L. Saltarelli was awarded the contract by the amusement company to provide all materials for and perform all the mason work according to the plans and specifications, including all excavating, under the direction of the architect. Saltarelli sublet the work of excavating and removing the necessary earth for that purpose to the defendants Shaffer with the approval of the architect. One George M. Wolf was the architect and he was also the president of the amusement company. There were two houses on the lot fronting on the westerly side of Sixteenth street whose southerly line bounded the northerly line of the amusement company's lot, one of the houses in the front and the other in the rear. A cement walk, two feet wide, extended from Sixteenth street westerly, south of the houses, furnishing the pathway for the entrance to the two houses. There was to be no cellar underneath the theatre building, but there was a removal of the earth for the construction, beginning at the front on Connecticut street

and extending by uniform grade northerly until it reached the depth of five feet from the surface at the rear of the building proper. The plans and specifications also provided for a furnace pit or heater room, further north and on the easterly side, about twenty feet square whose northerly line was substantially co-terminus with the southerly line of the lot above described fronting on Sixteenth street. The jury was justified in finding that at the time of the accident the earth had been excavated for this furnace pit, leaving the northerly side of the pit practically perpendicular and eleven and a half feet deep. No evidence was given to show with any degree of precision the boundary line between the lot of the amusement company and the lot fronting on Sixteenth street but the jury were authorized to find that the northerly side of the furnace pit excavation was on the boundary line. The southerly side of the cement walk was about a foot from the northerly side of the excavation for the furnace pit. This cement walk was in daily use down to the time of the accident and the only guard for the protection of those using the walk was a two by four rail nailed to stakes south of the walk, in the edge of the excavation.

The plaintiff and her husband, as tenants, occupied the front house whose entrance was easterly of the furnace pit excavation and ordinarily she had no occasion to use that part of the walk which ran along the side of this excavation. She worked out by the day leaving her house in the morning and returning after her day's work.

On the 12th day of May, 1914, the plaintiff after a day's work house cleaning returned to her home about half after five o'clock. Soon thereafter she discovered that a basket belonging to her had been taken by mistake to the rear house and started over the cement walk to get the basket. When she reached a certain point opposite the furnace pit excavation and stepped on the joint between two of the cement blocks, the blocks went down and she was thrown thereby sidewise into the excavation. In her fall her side came in contact with an exposed gas pipe on which her body lodged. She testified that no earth fell when the cement blocks went down and it was substantially undisputed and the jury were certainly justified in finding that the walk let the plaintiff down because

it had been undermined and the earth which had supported it had gone into the excavation owing to the removal of the lateral support which the excavated earth had theretofore afforded it. The jury were justified in finding that the plaintiff had no notice that her use of the walk would be attended with danger. It appeared that the soil in the region of the excavation was clayey and the walk might not have been undermined but for the effect of the heavy rains that preceded the day of the accident. The evidence was ample to show that both the amusement company and the contractor Saltarelli had sufficient notice of the danger to which the condition of the excavation exposed the plaintiff and those who had occasion to use the walk to have taken means to avert the danger if they had exercised reasonable care.

It is to be observed that the jury exonerated the defendants Shaffer, the subcontractors, from responsibility for the accident upon the theory, authorized by the evidence, that at the time of the accident they had completed their work and had turned over the portion of the excavation involved to the general contractor which had been accepted by him.

The contract of Saltarelli, the general contractor, obligated him to comply with the plans and specifications for the building and the specifications required him to comply with "all municipal rules, ordinances or regulations relating to buildings." The specifications also bound him to answer for any loss, damage or injury to any person or persons through the neglect, carelessness or incompetency of himself or his employees.

At the time of the construction of this theatre building and the execution of the contracts for such construction there existed sections 72 and 73 of the ordinances of the city of Buffalo. The following is a copy of the 1st paragraph of section 72:

"Whenever an excavation is to be made for any building or other purpose, and there shall be any wall or structure wholly or partly on adjoining land or near the intended excavation, then the party causing such excavation to be made shall notify the owner of said adjoining premises of such intended excavation, and also of the depth to which it is proposed to be made."

The following is a copy of section 73:

"In excavating to adjoining premises, where there is not existing a retaining wall at the time of such excavation, and in excavating to line of street curbs for any building or other purpose to a greater depth than four feet from grade, the party causing such excavation shall sheet-pile with plank two inches thick, extending full width and from grade to bottom of excavation. The party causing such excavation and placing such sheet-piling shall replace all damaged work and material in as good condition as it was before the excavation was commenced."

It is undisputed that nothing was done to support or protect the northerly side of the furnace pit excavation and the same was left down to the time of the accident without anything to prevent the earth from caving in, or being washed out by the rains, and that nothing was done by the owner of the theatre lot or any one employed in the work to give the owner of the lot on which this sidewalk existed the benefit of any of the provisions of the 73d section of the ordinances referred to.

The appellant, the amusement company, sought at the trial and now seeks immunity from liability to the plaintiff upon the ground that as it had employed a competent independent contractor to perform the work in question and the relation of master and servant as between it and him did not exist nor was he its agent, the appellant could not be held to respond for the negligence of the general contractor or his subcontractors. The appellant further maintains that it was not shown guilty of the neglect of any duty that it owed the plaintiff.

It will be observed that the learned trial judge gave the appellant the full benefit of the rule which relieves the owner from liability for the negligence of a general contractor and submitted the question of the appellant's negligence to the jury within very narrow limits. It will be remembered that the architect was the president of the appellant, its chief executive officer. The evidence shows that he knew that nothing had been done to protect the wall of the excavation next to the Sixteenth street lot and knew of the heavy rains and knew there was danger that the undermining would take place just as it did take place. He had all this knowledge a

sufficient length of time to have afforded him ample opportunity to supply the necessary protection. So that we have the case where the owner of property knew of a wrongful and dangerous condition of its property that might result in injury to third parties having the right to protection from such condition and where such owner knew of such condition a sufficient length of time so that it could have and ought to have removed the menace and failed to do it. This being the situation, the learned trial judge submitted to the jury the question whether or not such conduct was negligent, instructing the jury that if they found it to be negligent they might award such damages to the plaintiff as they might find she had suffered as the result of such negligence. We think the appellant cannot successfully complain of this ruling. In this connection it is to be observed that the trial judge called the attention of the jury to the 73d section of the ordinances of the city of Buffalo, instructing them in substance that they might find failure to observe the requirements thereof to be some evidence of negligence in connection with the other evidence. Assuming this section of the ordinances to be valid, which subject we shall discuss later, the ruling was right. Apart from this section of the ordinances, the evidence was sufficient to justify the trial court in submitting the question above considered to the jury. The appellant itself introduced evidence to show that it was customary in Buffalo to shore up and protect the sides of such excavations. We think that that evidence with the other evidence in the case was sufficient to justify the submission to the jury of the negligence of the appellant within the narrow limits above described and that, assuming it to have been error to receive that section of the ordinances in evidence, such error was insufficient to justify us in disturbing the verdict.

We think there is another view to take of the liability of the appellant based on the right of the owner of a parcel of land to the lateral support to his soil of the soil of the adjoining land, and the nature and character of such right. This right has been well described by Lord BLACKBURN in *Dalton v. Angus* (6 App. Cas. 740, 808) as follows:

"It is, I think, conclusively settled by the decision in this House in *Backhouse v. Bonomi* (9 H. L. C. [Clark] 503) that

the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

"This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbor is to use his land; but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case."

It is equally well settled that such right to lateral support does not extend to the protection of buildings. In England the right to lateral support for the protection of buildings might be acquired by prescription but such right could not be acquired in that way in this State. In England or here the right to such lateral support for the protection of buildings may be acquired by grant or covenant express or implied.

The owner of land may excavate on his own land up to the line between it and the adjoining land of his neighbor, but in so excavating he must take care to substitute for the soil so removed what shall be at least the equivalent thereof in lateral support to the soil of his neighbor. He who so excavates takes the risk, however careful he may be, of violating his neighbor's rights and thereby becoming responsible for any damages that may be the legitimate effect of such violation. The duty thus imposed upon one so excavating is of such a nature as in reason to forbid that he may delegate to another the work of so excavating and escape liability from responding in damages for failure in its performance. We are unable to perceive any difference in the character of the duty resting upon one about to do or cause to be done excavating on his own land in such proximity to adjoining land

as to endanger the lateral support to the soil of the adjoining land and the duty resting on one about to do or to cause to be done excavating on his own land in such proximity to adjoining land as to endanger the lateral support of a building on such adjoining land whose owner has acquired by prescription or grant or covenant express or implied or legislative authority, the right to such support. It has been declared that the character of the duty is the same by high authority. (*Dalton v. Angus*, *supra*, 742, 746, 792.)

There is authority in support of the proposition that such duty cannot be delegated so as to relieve the person primarily responsible for its performance from liability for failure in its performance. (*Dalton v. Angus*, *supra*; *Dorrity v. Rapp*, 72 N. Y. 307, 312; *Rosenstock v. Laue*, 140 App. Div. 467.)

In the *Dalton* case Lord BLACKBURN said (p. 829): "Ever since *Quarman v. Burnett* (6 M. & W. 499) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

The respective rights and duties of owners of adjoining property in a party wall seem to be analogous to the duty under consideration and neither of such owners may relieve himself from liability for failure to perform such duty by delegating to another the performance of work affecting the party wall that may endanger his neighbor's building. (*Hughes v. Percival*, 8 App. Cas. 443, 445.)

Bearing upon the duty owed by the appellant to the plaintiff, we may ask, What did the appellant undertake in the construction of this theatre building? Among other things it undertook to take from the Sixteenth street lot the

lateral support to which it was entitled. This it had no right to do unless it substituted an equivalent support. Before the equivalent was to be furnished the soil forming the lateral support had to be removed so that the accident was the result of the work itself however skillfully performed. Who then was the author of the mischief? Was it not the appellant which caused the excavation to be made, whether it was done by its own employees or let out by contract? The proprietor first determines that the excavation shall be made and then he selects his own contractor. Could the appellant escape responsibility for creating the dangerous situation resulting in the injuries to the plaintiff by interposing the contract which it made for the very thing which created the danger? We have here adopted the argument of Judge Comstock in *Storrs v. City of Utica* (17 N. Y. 104, 108.) We think the *Storrs* case points out the precise ground upon which the liability of the appellant herein should rest. The criticism in that case of *Blake v. Ferris* (5 N. Y. 48) by Judge Comstock and his discussion of the other cases referred to in the opinion makes clear the proposition that the appellant could not escape responsibility for the performance of the duty involved by letting the contract for the work to an independent contractor. The view of the law so forcibly expressed in the *Storrs* case is sustained in *Turner v. City of Newburgh* (109 N. Y. 301) and *Deming v. Terminal Railway of Buffalo* (169 id. 1). It is entirely clear that the appellant could not be held responsible for the collateral negligence of Saltarelli, the independent contractor. The cases relied upon by the appellant are easily distinguished from the case at bar. (*Berg v. Parsons*, 156 N. Y. 109; *Uppington v. City of New York*, 165 id. 222; *Froelich v. City of New York*, 199 id. 466; *Smyth v. City of New York*, 203 id. 106.)

In the *Berg* case it appeared that the plaintiff and defendant were owners of adjoining pieces of real estate in the city of New York. Upon the plaintiff's property there was a dwelling house. The defendant's property was vacant and was covered with a mass of rock which extended above the curb. The defendant made a contract with one Tobin to excavate his plot to the depth of ten feet below the curb line, preparatory to building thereon. In the performance

of the contract, Tobin appears to have proceeded unskillfully, and with considerable recklessness and, in the work of blasting he caused some damage to the plaintiff's house within and without. Although it was held by a divided court that the plaintiff was not entitled to recover, it is apparent that the negligence was solely the collateral negligence of the contractor.

In the *Uppington* case the city of New York had let to independent contractors the construction of a sewer in one of its streets. The sewer was built wholly in the street without encroaching upon private property. The city had the right to use the street for that purpose so long as it did not encroach upon the property of abutting owners. The claim of the plaintiff was that the work of constructing the sewer caused the ground in front of her premises to settle and thereby her house was injured. The court held that the city was not liable in any event and that the contractors would be liable for any negligence resulting in the injury to the plaintiff's property. Here again was a case where if there were any negligence it would have been the collateral negligence of the contractors.

There is nothing in the *Froelich* case conflicting with the view we have expressed.

In the *Smyth* case plaintiff's abutting property was injured by an explosion of dynamite used by a subcontractor of the general contractor and it was held that the city was not liable although the general contractor and the subcontractor would be liable for any negligence in the premises. Here again was the case of collateral negligence of the contractor and subcontractor.

So that in the case at bar the appellant as owner is liable at common law for depriving the adjoining land on which the plaintiff is a tenant of the lateral support to which it was entitled.

But the counsel for the appellant argues that the appellant's liability is confined to such damages as were suffered by the plaintiff's landlord to his land, if any, leaving the plaintiff without remedy. If that view is correct, then, if the owner of the adjoining land, that is, the plaintiff's landlord, had been dropped into the excavation and injured as the plaintiff

App. Div.]

Fourth Department, May, 1917.

was, he also would have been without remedy for his personal injuries. We do not take that view of the law. The plaintiff, the tenant, had all the rights of her landlord to the use of the walk and is entitled to damages for personal injuries caused by one violating those rights. The jury have found that the plaintiff suffered injuries as the direct result of the failure of the appellant to perform a duty which it owed to her and it would be a reproach to our judicial system if the appellant could escape liability upon a ground so utterly devoid of the first element of justice.

The counsel for the appellant further argues that, assuming that the rights of the tenant in the respect mentioned are the same as those of the landlord, the recovery here cannot be sustained because the right to the lateral support of the soil is confined solely to the land in a state of nature with no superincumbent burden like the walk and without the additional burden of the weight of a human being. No case is cited to sustain any such doctrine. But the proof here is that neither the weight of this little two-foot walk nor this woman's weight had anything to do with the undermining of the walk. The soil that supported the walk had disappeared before the plaintiff reached the point where the walk went down with her. Suppose there had been no cement walk and in its place simply a pathway made by the tread of the feet of the tenants of the lot upon the surface of the earth in its natural state and there had been a depression in such walk at the point of the accident caused in the same manner and of the same size as that into which the blocks of the cement walk on which the plaintiff stepped, dropped, and she had stepped into the depression and been injured in consequence thereof. Would there be any doubt about the negligence of the defendant? Does the fact that the blocks of cement went down with her affect the question of the defendant's negligence? It seems to us that it does not.

We think the appellant's liability may properly be upheld upon its failure to perform its duty not to withdraw from the soil of the adjoining lot its lateral support and that this view finds support in *Riley v. Continuous Rail Joint Co.* (110 App. Div. 787; *affd.*, 193 N. Y. 643).

The trial court permitted the jury, as it already appears,

to consider the failure of the appellant to comply with section 73 of the ordinances of the city of Buffalo as some evidence of negligence on its part in connection with the other evidence in the case. The appellant argues that such effect cannot be given to this provision in the ordinances because the common council had no authority under the powers delegated to it by the Legislature to pass an ordinance for such purpose. (Laws of 1891, chap. 105, with amendments, constituting the charter of the city of Buffalo under which the ordinances were enacted.) Sections 72 and 73 of the ordinances were received in evidence. Section 72 has no special bearing upon the case except in its first paragraph which introduces the subject of excavation. We need not, therefore, pass upon its validity. Section 73 is simply a regulation in harmony with and to carry out the common-law rule for lateral support to the soil. It is fully authorized by subdivision 5 of section 17 of the charter which empowered the common council "to prescribe general regulations for the erection of all buildings in the city." The appellant was engaged in erecting a building and the excavation in question was part of the work. We think that subdivision 11 of section 17 of the charter, usually referred to as "the general welfare clause," clothed the common council with the power to pass this ordinance. At the time of the passage of the statute forming the charter of the city of Buffalo it was a large growing city. Land had become very valuable. Building regulations were necessary and might well have been enacted by the common council in the exercise of the police power. The learned counsel for the appellant says in his brief: "We know of no case in which an ordinance has been accorded the effect of abrogating a settled rule of common law. The Legislature may abrogate, but it is not conceivable that a city council may with impunity set aside an established doctrine and create a new cause of action."

There was no attempt by the city council in the enactment of section 73 of the ordinances to abrogate a settled rule of the common law. The purpose was to enforce a settled rule of the common law and in that purpose to require certain specific acts to be performed to make more certain the observance of the rule of the common law.

We agree with the learned trial judge that the plaintiff

App. Div.]

Fourth Department, May, 1917.

rather than the appellant might complain of his rulings on the trial and that the appellant's rights were fully protected at every stage of the trial.

It follows that the judgment and order appealed from should be affirmed.

All concurred.

Appeal as against defendants Shaffer dismissed by consent. Judgment and order affirmed, with costs.

ADELBERT BOWDEN, Respondent, v. THE LEHIGH VALLEY
RAILROAD COMPANY, Appellant.

Fourth Department, May 9, 1917.

**Railroad — negligence — injury to motorcyclist at grade crossing —
evidence not justifying recovery — contributory negligence.**

Action to recover damage for personal injuries sustained by the plaintiff who, while riding a motorcycle across a railroad crossing, was struck by the defendant's train. The plaintiff had previously ridden over this crossing and was familiar with the locality; he did not reduce the speed of his machine which was moving approximately ten miles an hour until he was within eight or ten feet of the track upon which the train, a fast express, was approaching and at a time when it was only from fifty to seventy-five feet away. There was a great preponderance of evidence to the effect that the train gave warning by bell and whistle as it approached the crossing. On all the evidence, *held*, that a judgment for the plaintiff should be reversed in that no negligence upon the part of the railroad company was established and because the plaintiff was guilty of contributory negligence as a matter of law, and that the defendant's motion for a direction of a verdict should have been granted.

APPEAL by the defendant, The Lehigh Valley Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 20th day of July, 1916, upon the verdict of a jury for \$10,150, and also from an order entered in said clerk's office on the 22d day of June, 1916, denying defendant's motion for a new trial made upon the minutes.

Hubbell, Taylor, Goodwin & Moser [Clarence P. Moser of counsel], for the appellant.

Bentley & MacFarlane [William MacFarlane of counsel], for the respondent.

FOOTE, J.:

Plaintiff has recovered a verdict for personal injuries sustained in a collision between the motorcycle on which he was riding and one of defendant's fast trains at a highway crossing in the town of Mendon, Monroe county, on May 28, 1914.

Upon this appeal we are asked to hold that there was no proof of defendant's negligence or of plaintiff's freedom from contributory negligence sufficient to warrant the submission of those questions to the jury, and that defendant's motion for a direction of a verdict in its favor at the close of all the evidence should have been granted. I think defendant's contention is correct and that, as matter of law, defendant was entitled to a direction of a verdict in its favor.

On a former trial the jury rendered a verdict in favor of defendant. This verdict was set aside by the trial court on plaintiff's motion because of the misconduct of one of the jurors in visiting and inspecting the scene of the accident during the trial. That order we affirmed. (173 App. Div. 918.) Some additional witnesses were produced on the last trial and the case is, I think, stronger in favor of defendant.

There is no substantial dispute as to the facts. The accident happened just after sunset and while it was still daylight. Plaintiff was thirty-eight years of age and weighed 267½ pounds. He was riding a twin-cylinder Pope, seven or eight horse-power motorcycle weighing 230 to 240 pounds. He had been accustomed to ride motorcycles since 1905.

On the afternoon of the day of the accident he had ridden his motorcycle from the city of Rochester to Clifton Springs, passing over this crossing. He left Clifton Springs to return about seven o'clock and arrived at the crossing about an hour later. During the last 450 feet or more before he reached the crossing, he was traveling at a speed of eight to ten miles per hour according to his testimony, as indicated by his speedometer, and at the rate of about twelve miles per hour

according to the opinion of persons who were on the highway. The road is an improved State road. Defendant's tracks at the crossing are about three feet above the general level of the road on either side. The highway crosses the tracks substantially at right angles. Plaintiff approached the crossing from the south and the train which struck him was running east on the most southerly of the two tracks. Plaintiff did not reduce the speed of his motorcycle until he was within eight or ten feet of the south or nearest rail of the south track. On the contrary he applied more power so as to maintain the same speed on the ascending grade at the crossing. He then discovered the approach of the train, threw out the clutch and put on his brakes and attempted to and did stop, but not until the front wheel of his motorcycle was on the south rail, where he was struck. The train was one of defendant's fast mail and express trains, running on about its schedule and at the rate of fifty miles an hour.

There is a hamlet of about 300 inhabitants at and near this crossing, not incorporated as a village, and defendant maintains crossing gates and a signal bell, but neither the gates nor the bell are operated except between seven A. M. and six P. M. Plaintiff had been over this crossing on two or three previous occasions and was familiar with it to that extent. It does not appear whether he was aware that the gates were not operated after six P. M., but there is a notice to that effect upon a signboard at the crossing and he does not claim to have been misled by the open gates.

From the crossing in each direction defendant's tracks curve toward the south for about 320 feet east of the crossing, and about 943 feet west of the crossing, on about a two-degree curve. Buildings, trees and shrubbery obstructed plaintiff's view toward the west more or less for about 400 feet before he reached the crossing. He had, however, a partial view toward the west between the last two houses nearest to the railroad, where apparently by careful observation he could have seen the train. The distance between these houses was twenty-four feet. An outhouse and trees and a church shed obstructed the view between these houses to some extent, sufficient perhaps to excuse his failure to see the train even if he looked, as he says he did, because of the rate of speed

at which he was traveling. The last house on the west side of the road was thirty-eight feet from the south track. After passing this house the view toward the west is unobstructed. At forty-two feet from the first track the head of an engine coming from the west can be seen at a distance of 412 feet from the crossing, and this view widened rapidly as plaintiff proceeded toward the crossing until at the crossing it could be seen at a distance of 915 feet away. On the opposite side toward the east the last house stands 100 feet south of the tracks. Some trees and shrubbery obstruct the view more or less, but thirty feet from the first rail all obstructions have been passed and there is a clear view to the east along the tracks for 2,000 feet.

Plaintiff claims to have looked toward the west at three different points as he approached the crossing. The first point was about three hundred feet from the crossing, where he says he looked between two buildings but could see nothing because of the obstructions. The next point was about one hundred feet south of the first track. This is the point between the last two houses where the view is obstructed as stated. He saw nothing there. He continued on at the same rate of speed until he came to the northeast corner of the last house, which is thirty-eight feet from the track, when he glanced to the west and saw nothing though the engine and part of the train must then have been in sight. He then looked to the east and continued looking to the east until, as he says, he got to a point where he had passed the shrubbery and all obstructions, when he again glanced to the west and saw the engine bearing down upon him only fifty to seventy-five feet away. He was then about ten feet from the first track and too near to stop at the speed he was traveling. He says at that rate he could stop his motorcycle in about fourteen feet.

At about 450 feet from the crossing are four corners made by the crossing of another highway. At this point a number of boys had been playing ball and were making some noise. Just as he passed these boys the engine sounded a whistle, giving the usual signal — two long and two short blasts.

There is another highway crossing of the railroad about 915 feet westerly from the crossing where plaintiff was injured,

and the whistling posts for each of these crossings are located each about 1,500 feet west of each crossing. Thus the engine signals for these two crossings of a train moving at the rate of 50 miles per hour are given near together.

Thirty-one persons were sworn as witnesses upon the question of the signals given by this engine. All but two of these witnesses were within 475 feet or less of this crossing, except thirteen who were on the train.

Seven of them were witnesses for the plaintiff. Five of these heard the whistle for the crossing. One, a girl fifteen years of age who was between the two houses nearest to the crossing on the west side, did not hear the whistle but did hear the noise of the train. The other does not remember whether he heard it or not. Three of plaintiff's witnesses did not hear the engine bell. Two do not know whether it was rung or not and two do not remember.

Twenty-four witnesses were called by defendant. Ten of these were employees of the company and fourteen were not. Nine of the fourteen who were not employees heard the engine whistle for both crossings, and five for one crossing. Six employees who were on the train heard the whistle for both crossings. Three employees not on the train heard the whistle for both crossings and one employee not on the train heard the whistle for one crossing.

Of the nine who were not employees and who heard the whistle for both crossings, three were United States government mail clerks on the train and four were United States Express Company's clerks and messengers on the train. Three of the mail clerks heard the engine bell ring as they opened the car door just at the time of the accident. Two of the express company's clerks do not know whether the bell was rung or not, and two were not questioned on that subject. One of defendant's witnesses, not an employee of the company, did not hear the bell. Two do not know whether the bell was rung or not, and four were not questioned on that subject. Five employees heard the bell, one only, the engineer, being on the train. Two employees on the train heard the bell as the train came to a stop, but not before. One, the fireman on the train, did not notice whether the bell was ringing or

not. One brakeman on the train could not hear whether the bell was ringing, and one, the conductor on the train, was not questioned on that subject.

Of all these thirty-one witnesses near the scene of the accident, twenty-nine heard the engine signal its approach to this crossing by its whistle, while only one, besides the plaintiff, a fifteen-year-old girl standing between the houses, failed to hear it, and one does not remember whether he heard it or not. Ten of the thirty-one witnesses heard the bell, and none of the others testified that it was not ringing. Three testified that they did not hear it, and the others who were asked either say that they do not know or do not remember.

It is not claimed that any conditions exist at this crossing requiring other signals than by bell or whistle different from the conditions which exist at most railroad crossings in the country. It is much traveled for a country road and gates are maintained during the day time, but not so far as appears because adequate signals cannot be given by the engineer.

We thus have the question whether defendant can be held negligent for failing to give adequate warning when the warning which it did give was heard by twenty-nine persons who happened to be in the vicinity of the crossing, none of them so placed as to be better able to hear than plaintiff, unless it be those who were on the train and two employees of the company who were somewhat nearer to the train than was he.

The duty of the engineer was to give such warning as would be heard by persons who were listening attentively. That he did give such a warning is clearly demonstrated by the evidence which is undisputed, for his signals were heard by at least sixteen persons in the vicinity of this crossing, no one of whom was intending to go over the crossing and so under the duty which rested upon plaintiff to be attentive and vigilant. Nearly all of these twenty-nine persons, except perhaps those who were on the train, were in no better position to hear the signals than was plaintiff. They were no nearer to the engine when the signals were given than plaintiff, except two of them. Thus defendant has clearly demonstrated that plaintiff's failure to hear the signals was not because they were not loud enough to be heard, and, therefore, entirely adequate as signals. If plaintiff did not hear them, as he says, his failure

App. Div.]

Fourth Department, May, 1917.

to hear can only be explained on the theory that his hearing was defective or that the noise of his motorcycle prevented. There was some noise and shouting by the boys who had been playing ball at about the time the whistle was blown for one of the crossings, but this did not prevent all the witnesses who were in the immediate vicinity of these boys and the boys themselves from hearing the whistle. The railroad company was not required to anticipate that the plaintiff would not hear signals because he was riding upon a noisy machine or because his hearing was defective. Adequate signals are such as can be heard by persons who are listening attentively, whose hearing is unimpaired and who are not themselves making so much noise as to prevent hearing the signals which are customarily given at railroad crossings. No traveler on the highway expects to hear any other signals at the ordinary country crossing than those given by whistle or by bell or by both. He knows, or should know, that if the noise of his vehicle will prevent his hearing these customary signals then he will be without warning and should govern himself accordingly. Railroad companies are not required by law to anticipate that a traveler so situated that he cannot hear the customary signals because of the noise of the machine he is riding will proceed onto a crossing without taking such other precautions as an ordinarily prudent man would deem necessary for his safety.

I am of the opinion that no negligence of the railroad company was established. I am also of opinion that plaintiff failed to prove the absence of negligence upon his part, and that he was not entitled to have that question submitted to the jury.

Plaintiff's claim is that he looked to the west at three different places before his last look which proved to be too late. His counsel contends that his failure to discover this train at either time was because of the obstruction of buildings, trees and shrubbery. Plaintiff, therefore, knew at the time he arrived at the point about forty feet from the track where he could first get an unobstructed view to the west along the north side of the last house that he had had no clear view up to that point. At that point the train was in sight but he did not see it. He says he *glanced* to the west. Either this

glance was an inattentive one or it was taken before the house had ceased to be an obstruction to his view. At any rate it was only a glance. He then turned to look to the east long enough to satisfy himself that no train was coming from that direction, and when he again turned his eyes toward the west he was only ten feet from the track, and the engine only fifty to seventy-five feet away. During all of this time his motorcycle was running at a speed of eight to ten miles per hour, with more power applied as he came to the upgrade to keep up that rate of speed, and according to his own claim, it was a rate of speed so great as not to give him sufficient time to look effectively in both directions before it was too late. Down to the time he gave the glance to the west near the corner of the house he had received no information as to whether a train was coming from that direction. I think he was negligent as matter of law because he failed to reduce the speed of his machine sufficiently to give him time to get a clear view of the track to the west before it was too late. All thoughtful persons will agree that one who drives his horses onto a railroad crossing at a gait of eight to ten miles per hour and applies the whip to keep them up to that gait where he has not been able to see whether a train is coming from either direction until he is within ten feet of the track is not only negligent but reckless and foolhardy, if that rate of speed does not permit of a fair view in both directions in time for him to stop if necessary. While ten miles per hour may be a moderate speed for a motor vehicle, still it is true, as plaintiff's counsel asserts, that it put plaintiff within ten feet of the rail while he was looking to the east for only about two seconds and before he could get a fair view to the west. There may, of course, be conditions and circumstances surrounding a railroad crossing that will excuse such a rate of speed, as there may be circumstances and conditions requiring more adequate signals or other precautions by the railroad company, but there were none here.

I think defendant's motion for a direction of a verdict should have been granted. As was said by Judge MARTIN in *McDonald v. Metropolitan St. R. Co.* (167 N. Y. 66): "So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which

App. Div.]

Fourth Department, May, 1917.

has been introduced is conclusively answered, so that as a matter of law no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it."

It follows that the judgment and order appealed from should be reversed and judgment directed in favor of defendant dismissing the plaintiff's complaint, with costs.

All concurred.

Judgment and order reversed and judgment directed in favor of the defendant dismissing the complaint, with costs.

WILLIAM E. MASTIN, Respondent, v. JOHANNA BOLAND,
Doing Business under the Firm Name and Style of the OLD
HOMESTEAD DINING ROOM, Appellant.

Fourth Department, May 16, 1917.

Sale — breach of warranty as to quality of goods — counterclaim founded upon breach of warranty — Personal Property Law construed — notice to seller.

Where in an action to recover the full contract price of canned foods sold and delivered to the defendant the court finds as a fact a breach of warranty as to the quality of the goods, which breach is set up as a counterclaim by the defendant, it was error for the court to allow a full recovery by the plaintiff upon the theory that the counterclaim for breach of warranty is ineffective because the defendant kept and used the goods after knowledge of the breach. This, because under the Personal Property Law, as amended, the defendant on discovering the breach of warranty may retain and use the goods and recoup her damages out of the purchase price, provided she gave notice to the plaintiff of the breach of warranty within a reasonable time after its discovery by her.

Where it appears that at the time of the delivery of the goods the defendant did not know the plaintiff's name or address, a notice of breach of warranty given three weeks later when the plaintiff called to collect the price was given within a reasonable time.

APPEAL by the defendant, Johanna Boland, from an order of the County Court of Onondaga county, entered in the office of the clerk of said county on the 19th day of December, 1916, affirming a judgment of the Municipal Court of the

City of Syracuse in plaintiff's favor and also from the judgment entered in said clerk's office on the 19th day of December, 1916, affirming said Municipal Court judgment pursuant to the order appealed from.

Hand & Michael [*P. Sidney Hand* of counsel], for the appellant.

William F. Hodge, for the respondent.

FOOTE, J.:

The decision as first made by the Municipal Court judge clearly indicates that he found with defendant as to the warranty, its breach, and that the defendant sustained damages thereby which constituted a good counterclaim. His subsequent order modifying his first decision permitted plaintiff to recover the full contract price for the goods delivered and allowed nothing upon the counterclaim. We cannot assume that he intended to find the facts differently. His decision indicates that while finding the facts in favor of defendant, he held her not entitled to recover upon her counterclaim because she had kept and used the goods after full knowledge of the breach of the alleged warranty, or the failure of the goods delivered to correspond in description with the goods purchased. We think the learned judge in so deciding has failed to give effect to sections 93, 95, 130 and 150 of the Personal Property Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45), as added by chapter 571 of the Laws of 1911. By these sections, if the goods delivered were not the variety of canned vegetables which defendant purchased and which plaintiff represented them to be, as she alleges, then, even though the contract was executory, defendant had the right to retain and use the goods after discovering that they were not as represented, and recoup her damages out of the purchase price, provided she gave notice to plaintiff of the breach of his promise or warranty within a reasonable time after its discovery by her. If it be true, as claimed by defendant, that she did not know at the time the goods were delivered plaintiff's name or address, then we think the notice which she did give about three weeks after the sale, when plaintiff called at her house to collect his pay, was within a reasonable time.

App. Div.]

First Department, June, 1917.

The judgments of the County Court and the Municipal Court should be reversed, with costs in this court and in the courts below to abide the event, and a new trial ordered in the Municipal Court.

All concurred.

Judgment of County Court and judgment of Municipal Court reversed, with costs in this court and the courts below to the appellant to abide the event, and a new trial granted, to be had in the Municipal Court on the 29th day of May, 1917, at ten A. M.

ANGIE M. BOOTH and MARY T. SUTPHEN, Respondents, v.
WILLIAM H. WELLINGTON KNIPE and WATERSIDE LAND
CORPORATION, Appellants.

First Department, June 8, 1917.

Real property — covenant to erect building construed — when covenant does not run with land and is not enforceable by other grantees — use of residence by physician as private maternity hospital.

A covenant whereby a grantee, for himself, his heirs and assigns, agreed with the grantor that within two years from the date of the deed he would cause to be erected and fully completed upon the lands a first class building adapted for, and which shall be used only as, a private residence for one family, and which shall conform to certain plans, is not a restrictive covenant running with the land, and hence is not enforceable by another grantee holding under a deed from the same grantor containing a similar covenant. Such covenant is a personal agreement with the grantor to erect a building for a particular use within a specified period, and did not continue binding upon subsequent purchasers until the erection of the building.

But a grantee of lands on which a building had been erected in compliance with said covenant has a standing in court to enforce the covenant, if binding, against another grantee, although she owns other lands purchased from the same grantor on which such building has not been erected as required by the covenant.

A restrictive agreement or covenant with respect to the use of demised premises is to be construed most favorably to the grantee.

In any event, a case for the equitable enforcement of the aforesaid covenant has not been made out where a building in compliance therewith was actually erected on the lands now held by the defendant, for there was

no limitation of time during which the building was to be used as a private residence, and hence the building might have been demolished and another erected and used for other purposes.

Moreover, there is no violation of the covenant where the defendant, a physician, uses the building as a private residence and in addition merely lodges and treats maternity patients, and indicates such professional business by an inconspicuous sign.

APPEAL by the defendants, William H. Wellington Knipe and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of March, 1917, continuing an injunction *pendente lite* restraining the alleged violation of a restrictive covenant.

James A. Farrell [*Louis Bevier, Jr.*, with him on the brief], for the appellant Knipe.

George L. Ingraham, for the appellant Waterside Land Corporation.

Theodore W. Morris, Jr., for the respondent Sutphen.

Robert F. Greacen, for the respondent Booth.

LAUGHLIN, J.:

On the 26th day of June, 1896, one Sutphen, who then owned the entire frontage on Riverside Drive between Seventy-second and Seventy-third streets in the city of New York, filed a subdivision map thereof in the office of the register of the county of New York. On the twenty-ninth day of the same month he conveyed lot No. 21 shown on the subdivision map to one Kleeburg. The deed contained the following: "But this conveyance is made by the said parties of the first part to the said party of the second part, on the agreement that he, the said party of the second part, his heirs and assigns, shall within two years from the date hereof cause to be erected and fully completed upon said lot, a first-class building, adapted for and which shall be used only as a private residence, for one family, and which shall conform to the plans made or being made by P. H. Gilbert, architect, No. 18 Broadway, New York City, for the whole front between Seventy-second and Seventy-third streets, on Riverside Drive, and said conveyance is made and said lot is sold upon that

App. Div.]

First Department, June, 1917.

condition." The grantee erected on the premises a dwelling house in conformity with the agreement contained in the deed, but whether within the time specified does not appear. He thereafter occupied the house as a family residence, and on the 16th of October, 1907, conveyed to a grantee by the same name, who on the 4th of January, 1908, deeded the premises to one Guggenheim, during whose ownership it was used for a period by a tenant as a private boarding house. On the 30th of June, 1914, Guggenheim conveyed to the defendant company, and it leased the premises to the defendant Knipe for the term of five years from the 15th of August, 1915. The lease contained the provision that the premises should be used by Knipe "as a sanatorium, and not otherwise." Knipe was a physician and he took possession of the house and used it as his residence and as a private hospital or sanatorium, and received and administered therein to women in child birth the treatment known as "twilight sleep," having from one to three patients at a time; but made no architectural or external changes in the building, and there was no external evidence of its use other than the doctor's small professional sign at the entrance. This use of the premises has been enjoined as violative of the agreement or condition upon which the premises were conveyed by Sutphen. On the 18th of January, 1897, Sutphen conveyed lot 25, which was part of the premises plotted but fronted only on Seventy-third street in the rear of the lots fronting on Riverside Drive, with a like restrictive covenant; and on the 3d of May, 1899, he conveyed lot 19, the second to the north of the premises in question, with a like restriction. Thereafter and on the 17th of November, 1900, Sutphen died leaving a last will and testament giving a power of sale to his executors. On the 5th of May, 1906, his executors conveyed lot 22, adjoining lot 21 on the north, and the deed contained similar provisions. On the 20th of October, 1909, the plaintiff Booth acquired title to said lot 22. A dwelling house has been erected on that lot in conformity with the restrictive covenant, which she occupies as a private residence, but it does not appear when or by whom the house was erected. She alleges also that she is the owner of lot 20 which adjoins the premises in question on the south, and lots 23 and 24, which lie to

the north of her residence, all of which were conveyed by Sutphen's executors under like restrictions, but those three lots are still vacant. The plaintiff Sutphen owns lot 18 which fronts on the curve from Seventy-second street into Riverside Drive and is the third lot south of lot 21, and that was conveyed with similar restrictions, and upon it has been erected a house in accordance with the agreement, but the date of erection does not appear, and it has been and is used as a private dwelling house. There was erected on lot 19 a house which accords with the agreement and it has been and still is used as a private residence.

The plaintiffs claim that the agreement contained in the conveyance from the owner who plotted the premises constitutes a restrictive covenant with respect to the use of the first building erected which runs with the land, and that the use of the dwelling house on lot 21 is a violation thereof which entitles them to injunctive relief. It is unnecessary to consider the claim that the failure of the plaintiff Booth to build on the three vacant lots owned by her is a bar to any relief on her part, for that would not bar relief to the plaintiff Sutphen upon whose lot a private residence has been erected and is used as such. The questions presented for decision by the appeal, therefore, are whether this was a restrictive covenant running with the land; and if so whether the use of the house by the defendant Knipe constitutes a violation thereof. It is a general rule that a restrictive agreement or covenant with respect to the use of demised premises is to be construed most favorably to the grantee. (*Sullivan v. Sprung*, 170 App. Div. 237; *Lewis v. Ely*, 100 id. 252; *Clark v. Devoe*, 124 N. Y. 120; *Blackman v. Striker*, 142 id. 555; *Mitchell v. Reid*, 192 id. 263; *Moller v. Presbyterian Hospital*, 65 App. Div. 134; *Sonn v. Heilberg*, 38 id. 515; *Kitching v. Brown*, 180 N. Y. 414, 427.) The learned counsel for the appellants contend that this should not be construed as a restrictive covenant running with the land, but as a mere agreement on the part of the grantee and perhaps his grantees within two years with respect to the erection and use of the building in the first instance, which was fully satisfied by the erection of a dwelling house and its use strictly as a private residence for some years, long before the defendant company acquired

title and leased the premises to the defendant Knife. They rely principally upon *Miller v. Clary* (210 N. Y. 127), holding that a covenant to construct and maintain a shaft does not run with the land and is not enforceable against the owner to whom the servient estate was subsequently conveyed; and upon *Hurley v. Brown* (44 App. Div. 480), which involved a covenant or agreement by a grantee to build a two-story dwelling of a fixed value with an express agreement that relief might be had by injunction for a breach thereof, and in which that was held to be an affirmative covenant not enforceable against a subsequent owner, and that in any event it was complied with by the erection of the building in the first instance since there was no express restriction with respect to the use of the building. The court in that case also expressed the opinion that the building, after having been erected in accordance with the covenant or agreement, might have been altered or torn down and a new building erected; and that even if the covenant ran with the land it was enforceable only within a reasonable time; and that the violation, if any, occurred before the defendant acquired title, on the theory that a reasonable time had elapsed, and that, therefore, the breach, if any, was by defendant's grantor. Appellants also rely upon *Kurtz v. Potter* (44 App. Div. 262; *affd.*, 167 N. Y. 586), which involved a restrictive covenant to the effect that the first buildings erected within twenty years should be private dwellings planned and adapted for the residence of families or for churches, and in which it was held that this was a restriction with respect to the character of the building to be erected but not with respect to the use thereof.

As already stated it does not appear when the house on lot 21, owned by the defendant company and occupied by the defendant Knife, was erected; and it is, therefore, contended that it has not been shown that it was erected pursuant to the agreement. There is much force in the contention that if no house had been erected within the agreed period, a subsequent purchaser could not have been compelled to build and would not have been limited by the agreement. It will be observed that there was no agreement obligating the grantee to maintain the building for any length of time and, therefore, he was at liberty to demolish it immediately

after having erected and used it in accordance with the agreement, and would then have been unrestricted by this covenant with respect to the character of the building to be subsequently erected or the use to be made thereof. On that theory it is argued that if the use made of the building be a violation of the restrictive agreement or covenant it is not a case for the interposition of a court of equity since the defendants might by demolishing the building and erecting another lawfully make the same use of the premises that they are now making. This court recently in *Reed v. Sobel*, decided on the 13th day of April, 1917 (177 App. Div. 532), held that a covenant that the first buildings to be erected on premises conveyed should be "private dwellings constructed for the use of one family only," did not restrict the use, and that without front exterior architectural changes the building could be lawfully changed into apartments; and in *Baumert v. Malkin* (178 App. Div. 913) this court held that a covenant in a conveyance providing that the first buildings should be "first-class private dwellings designed for the use of one family only" was not violated by the use of the dwelling as a studio. In *Lewis v. Ely* (*supra*) this court held that a restriction with respect to the erection of buildings permitting the erection of private dwellings only, although declared to run with the land, did not restrict the use. In the case at bar counsel for the respondents rely upon the fact that this restrictive covenant was not limited to the character of the building to be erected but expressly relates to the use as well; and reliance is placed principally upon *Barnett v. Vaughan Institute* (119 N. Y. Supp. 45), affirmed on the opinion of Mr. Justice THOMAS at Special Term (134 App. Div. 921) and affirmed by the Court of Appeals without opinion (197 N. Y. 541). In that case the covenants were "that the buildings erected * * * shall be first-class private houses and shall stand back at least twenty feet from the street line of Park Place. This covenant is a real covenant running with the land and binding * * * until the 1st day of December, 1912 * * *." There, as will be seen, it was expressly agreed that the covenant ran with the land, and it was held that it was violated by the use of the house thereafter erected thereon as a private sanatorium and by moving another house on the same lot and using it

App. Div.]

First Department, June, 1917.

for like purposes, the two houses together accommodating forty-one patients. In *Goodhue v. Pennell* (164 App. Div. 821) it was held that a restriction against the erection of a building other than one *to be used* as a private dwelling restricted the *use*. It will be observed that the decisions apparently are not in harmony with respect to the construction of restrictive covenants; but it is not necessary on this appeal to attempt to reconcile them or to say which should be followed if they are in conflict on the adjudications on the facts necessarily presented.

Counsel for the respondents contend that it is to be inferred that the original owner formed a general scheme for the improvement and development of the property and that, therefore, this agreement or covenant should not be construed as merely intended for his protection in selling the other lots and limiting the character of the buildings first to be erected, but as a general restriction of the use of the dwelling houses to be erected, for the benefit of himself and his grantees, in accordance with the rule stated in *Korn v. Campbell* (192 N. Y. 490, 495) and in *Silberman v. Uhrlaub* (116 App. Div. 869). If it was intended to restrict the use of the houses for the benefit not merely of the grantor but of his grantees then the agreement was not, I think, so drawn as to be effective for that purpose. In form it is an agreement exacted of the grantee by the grantor as a condition of accepting the grant and it is not expressly made to run with the land. It is not a covenant against use but a personal agreement to erect for a particular use within a specified period. The provision that the lot was sold and grant made on the condition that such a house would be so erected indicates, I think, that the grantor intended to reserve the right to declare the grant forfeited for a violation or failure to perform the agreement.

I am of opinion, therefore, that this agreement should not be construed as a restrictive covenant running with the land, but merely as an agreement between the grantor and the grantee with respect to the character and use of the building to be erected and the time within which it was to be erected. It may have bound any purchaser within the two years but it did not continue binding on purchasers indefinitely until

the erection of the building. The defendants could not compel the plaintiff Booth to build now on her vacant lots and I think no one could. But if it were not susceptible of this construction I am of opinion that a case for equitable relief has not been made out. As already observed, there is here no limitation of the time during which the building shall be used as a private residence and, therefore, it might have been demolished and another building erected and used as this is now used. Furthermore, it is not at all clear that the use made of the building is a violation of the agreement. The defendant Knipe used the house as his private residence and for an office and for a limited number of his patients. So far as appears externally the building is a private residence and is occupied as such by the defendant Knipe. The only external indication that it is not used exclusively as a private residence is his inconspicuous professional sign. In *Gallon v. Hussar* (172 App. Div. 393) the Second Department, distinguishing *Barnett v. Vaughan Institute* (*supra*), decided by the same court, held that a similar covenant should not be so construed as to prevent a physician from taking a few patients into his own house for treatment or from taking boarders; and in *Smith v. Graham* (161 App. Div. 803), in an opinion adopted by the Court of Appeals (217 N. Y. 655), it was held by the Fourth Department that a covenant, which it was expressly agreed should run with the land, to erect only a dwelling, but reserving to the grantee the right to receive and care for medical and surgical patients, was no broader with respect to the reserved right to care for medical and surgical patients therein than would have existed without it, and that a dwelling so long as it is used as a dwelling "may be also used as a place for carrying on some kinds of business provided such business is of such character as to be no inconvenience to neighboring property holders."

I am of opinion, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

THE FROHMAN AMUSEMENT CORPORATION, Appellant, v.
ALBERT BLINKHORN, Respondent.

First Department, June 8, 1917.

**Principal and agent — suit for an accounting — evidence — proof
of oral contract of agency following prior written contract.**

Where in an action by a principal against his agent to recover moneys alleged to have been received in a fiduciary capacity and converted by the agent, the latter offered in evidence a written contract which, while governing his right to sell certain motion picture films manufactured by the plaintiff and fixing his commissions, referred only to two specific films completed by the plaintiff at the time of the contract, and it is admitted that the defendant has accounted for the two films sold under said written contract, it was error for the court to exclude evidence by the plaintiff of a subsequent parol agreement giving to the defendant the right to sell the plaintiff's future productions upon the theory that the parol agreement was merged in the writing. The written contract, with respect to picture films on hand at the date thereof, did not preclude the plaintiff from proving the verbal contract with respect to its future productions, as to which it asks an accounting by the agent.

APPEAL by the plaintiff, The Frohman Amusement Corporation, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 11th day of November, 1916, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

Herman Kahn, for the appellant.

Arthur F. Hansl, for the respondent.

LAUGHLIN, J.:

This is an action by a principal against its agent to recover moneys alleged to have been received by the agent in a fiduciary capacity and the value of property alleged to have been converted by the agent.

The plaintiff alleged in an amended complaint that it was engaged in manufacturing and selling moving picture films; that on the 12th of May, 1915, it entered into an agreement with the defendant by which it gave him the right to

sell its moving picture films and agreed to pay for his services ten per cent of the gross amount received, and that he accepted the employment and agreed to account and remit to the plaintiff immediately upon receiving payment for any films sold; that thereafter and in connection with the agreement and for exhibition purposes it delivered to him four moving picture films of the value of \$162.74 each, which he promised and agreed to return on demand, and that on the 3d of February, 1916, it duly demanded the return thereof, and he promised to return them forthwith, but failed so to do, and has converted them to his own use; that in the month of October, 1915, defendant in behalf of plaintiff sold the rights to present a moving picture known as "John Glayde's Honor" in the British Isles, and received therefor £1,650, and that his commissions and disbursements on the sale thereof amounted to £650, and that plaintiff was entitled to the balance, which it duly demanded, but that defendant remitted to plaintiff £400 only, and failed to remit the balance of £600, which was equivalent to \$2,862 in United States money; that during the same month the defendant sold in behalf of the plaintiff the rights to present said last named moving picture and another moving picture known as "Just Out of College" in Australia, and received on account thereof \$900, and the plaintiff received the balance of the purchase price, and that defendant's commissions and disbursements on said last-mentioned sale aggregated \$1,215, or \$315 more than he received on account of said sale, which deducted from the \$2,862 owing to plaintiff on account of the other sale, left a balance due and owing to plaintiff of \$2,547 in addition to the value of the films so converted.

After service of the amended complaint, plaintiff obtained an order of arrest herein on the ground that the defendant received the moneys in a fiduciary capacity and converted the films, and the order was sustained by this court, notwithstanding defendant's contention that the action is for an accounting and that he was not obliged to pay over the moneys but merely to account therefor. (*Frohman Amusement Corporation v. Blinkhorn*, 175 App. Div. 926.)

The president of the plaintiff testified that on the 12th of May, 1915, at the instance of the defendant, he made a

verbal agreement with him in behalf of the plaintiff by which the defendant was authorized to offer for sale all moving picture films which plaintiff then had on hand or might produce in the future, and to cable plaintiff the offers received, and if the offers were satisfactory to plaintiff he was to sell the films and remit the proceeds, less a commission of ten per cent and the cost of making for the purchaser not to exceed ten prints at three and one-half or four cents per lineal foot; that plaintiff then had two films known as "Builder of Bridges" and "Fairy and the Waif," and the verbal agreement related to those and to "everything that we made in the future," and that it was agreed that defendant "was to handle all pictures that we were to produce in the future." On the cross-examination of the witness, defendant showed that a contract in writing was made between the parties on the day the parol contract was made, and it was offered in evidence by the defendant. That contract relates only to the two films which the plaintiff then had on hand. By it the plaintiff gave the defendant the right to dispose of the English rights with respect thereto and also the right to offer and to sell positive prints thereof to purchasers and exhibitors in all parts of the world with the exception of the United States and Canada, but no sale was to be consummated without the approval of the plaintiff, and the defendant was to have a commission of ten per cent of the gross amount. It appears that the defendant sold the rights to the two motion pictures specified in the contract in writing, and duly accounted therefor; and the motion picture rights covered by that contract are not involved in this action. It was stipulated that the defendant thereafter sold for plaintiff the motion picture rights to "John Glayde's Honor" and received therefor the sum of £1,650, as alleged. The plaintiff's president further testified in answer to questions asked by the court that the picture "John Glayde's Honor" was not mentioned in the contract in writing for the reason that it had not been produced at that time, but that it was verbally agreed that defendant was to have the right to sell all of plaintiff's future productions on the same terms as those provided in the contract in writing with respect to the two pictures then on hand.

After the written contract was introduced in evidence the court, on motion of defendant's attorney, struck out the testimony relating to the agreement made between plaintiff's president and the defendant on the ground that the parol negotiations were merged in the writing, notwithstanding the contention of the attorney for the plaintiff that the rights covered by the written contract were not involved in this action and that the verbal contract was general and related to all future productions of the plaintiff, and that the rights with respect to "John Glayde's Honor" were given to the defendant for sale and were sold by him pursuant to the general parol contract negotiated on that day. After the evidence was stricken out, the attorney for the plaintiff attempted again to prove the parol contract under which he claimed the rights to "John Glayde's Honor" were sold by defendant, and the evidence was excluded and he excepted and rested without offering any evidence concerning the delivery of the films alleged to have been converted. It is perhaps to be inferred from the written contract that two of the four films alleged to have been converted were delivered to the defendant under that contract, but the writing is silent with respect to the return or final disposition of those films.

I am of opinion that the learned court erred in striking out the evidence. If the action related to the sale of rights covered by the contract in writing, of course the writing would govern and supersede all prior negotiations with respect to the matters embraced therein. The making of the written contract, however, with respect to pictures then on hand would not preclude the plaintiff from proving the verbal contract with respect to its future productions, one of which is the principal subject of this litigation.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

JOHN A. KINGSBURY, Commissioner of Public Charities of the City of New York, on Complaint of ROSE STERNBERG, Appellant, v. FRANK S. STERNBERG, Respondent.

First Department, June 8, 1917.

Husband and wife — failure of husband to support wife — conviction as disorderly person — interlocutory decree of divorce and separation agreement no bar to proceeding.

An interlocutory judgment for absolute divorce does not terminate the marriage of the parties, and they remain husband and wife until the entry of the final decree.

A wife who has obtained such interlocutory judgment, but has not entered final judgment is not debarred from instituting a proceeding under section 685 of the charter of the city of New York against her husband as a disorderly person because of his failure to support her.

Neither is such proceeding debarred because the parties had previously entered into a formal separation agreement in which the husband agreed to pay a certain sum for the wife's support, if he has failed to fulfill his agreement.

APPEAL by John A. Kingsbury, as commissioner of public charities, from a judgment of the Court of General Sessions of the Peace held in and for the county of New York, Part I, entered in the office of the clerk of said county on the 22d day of October, 1915, reversing a judgment of the Domestic Relations Court convicting defendant of being a disorderly person and ordering him pursuant to the provisions of section 685 of the charter of the city of New York to pay the sum of five dollars per week for one year for the support of his wife. (See Laws of 1901, chap. 466, § 685, as amd. by Laws of 1912, chap. 420, and Laws of 1914, chap. 457.)

E. Crosby Kindleberger [Terence Farley, William J. Millard and James D. Carr with him on the brief], for the appellant.

Samuel B. Pollak, for the respondent.

LAUGHLIN, J.:

In an action for divorce brought by the defendant's wife against him in the Supreme Court in the county of New York an interlocutory judgment was entered on the 24th

of January, 1913, requiring the defendant to pay for the support and maintenance of his wife the sum of nine dollars weekly, but it was provided, in the usual form, that the final judgment should not be entered until the expiration of three months after the entry of the interlocutory judgment and that it might be entered within thirty days thereafter unless otherwise directed by the court. Pending the divorce action the defendant went to Europe and returned only a few days before he was arrested and brought before the magistrate. A final judgment has not been entered pursuant to the interlocutory decree. The reversal of the conviction was upon the authority of *People ex rel. Commissioners of Charities v. Cullen* (153 N. Y. 629). The statutory provisions before the court in *People ex rel. Commissioners of Charities v. Cullen* (*supra*) were somewhat different from those on which the conviction of the defendant was had, and they were construed by the court as authorizing a conviction only for a willful and voluntary separation and abandonment without justification and failure to support. In that case, however, the alleged abandonment was after a final decree of separation from bed and board obtained by the wife which did not require the husband to support her but contained a provision for an application at the foot of the decree for support in the case of a change in his financial circumstances. The court held that after a judicial separation at the suit of the wife the marriage relation was so far terminated or suspended that the husband cannot be deemed guilty of abandonment or desertion "in any legal sense" and that the judgment effected a change in the marriage contract and required them to live apart from each other and that, therefore, the decree modified the common-law obligation of the husband to support his wife and that thereafter his legal obligation in that regard was to be measured by it. An interlocutory judgment, however, does not terminate the marriage relation and the parties remain husband and wife until the entry of the final decree. (*Matter of Crandall*, 196 N. Y. 127; *Pettit v. Pettit*, 105 App. Div. 312; *Burton v. Burton*, 150 id. 790.) Section 899, subdivision 1, of the Code of Criminal Procedure declares a husband who actually abandons his wife or children without adequate support or leaves them in danger of becoming a

App. Div.]

First Department, June, 1917.

burden on the public or neglects to provide for them according to his means a disorderly person; and section 685 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1912, chap. 420, and Laws of 1914, chap. 457) declares a husband who in the city of New York actually abandons his wife or children without adequate support or leaves them or either of them in danger of becoming a burden upon the public or neglects to provide for them or either of them according to his means a disorderly person, and that evidence that they are without means shall be presumptive proof of their liability to become a charge on the public.

The wife testified that she and the defendant were married in the city of New York fifteen years ago; that they lived together five years ago in Brooklyn; that her husband left her and they subsequently entered into a formal separation agreement under date of the 6th of August, 1910, by which he agreed to pay her five dollars a week for her support and maintenance; that he made the payments under the agreement for about two years and a half and then went to Europe and has made no payment since; and that they had not lived together since, and that she was without means and unable to work.

It is contended by the respondent that both the interlocutory decree and the separation agreement constitute a defense and preclude his conviction. The case principally relied on by the respondent in support of his contention that the separation agreement constitutes a defense is *Powers v. Powers* (33 App. Div. 126) which was an action for a separation and in which the court refused to grant a separation on the ground of abandonment where it appeared that the parties had entered into a formal separation agreement by which they were to live separate and apart; but in that case the rights of the wife only were involved whereas here the rights of the public are involved.

It has been held that the existence of a separation agreement and an interlocutory decree of divorce in favor of the husband does not preclude his conviction as a disorderly person in failing to support his wife (*People v. Meyer*, 12 Misc. Rep. 613) and that even a final judgment of divorce or

separation containing a provision for the support of the wife and children is no bar to a conviction of the husband for failing to support his children. (*People on Complaint of Soriano v. Soriano*, 157 App. Div. 892; *Matter of Soriano*, 166 id. 935; *affd.*, 216 N. Y. 720; *People ex rel. Ukers v. Ukers*, 172 App. Div. 907.) It has also been held that an order for alimony which the husband failed to pay was not a bar to his conviction as a disorderly person. (*People ex rel. Goetting v. Schnitzer*, 71 N. Y. Supp. 320.) Some of those rulings were made at Special Term but we think they are sound and that neither the separation agreement nor the interlocutory decree constitutes defense to the prosecution of the defendant and that he was properly convicted.

It follows that the order appealed from should be reversed and the judgment of the magistrate affirmed.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Order reversed and judgment of magistrate affirmed. Order to be settled on notice.

WILLIAM C. LESSTER, 2d, Respondent, v. GRACE FELIX LESSTER and Others, Appellants.

First Department, June 8, 1917.

Will — evidence not establishing undue influence or lack of testamentary capacity — disability of old age not equivalent to testamentary incapacity — evidence — declarations of testator, when incompetent on issue of undue influence — declarations subsequent to execution of will — declarations of testator's wife — testimony of legatee under former will.

Action to determine the validity of the probate of a will pursuant to the provisions of section 2653a of the Code of Civil Procedure, the plaintiff, a grandson of the testator, alleging lack of testamentary capacity, fraud and undue influence. The testator at the time of his death was about eighty-one years old, and the will had been executed about four months previous, and had been preceded by at least three other wills. Aside from a legacy to his sister in law, who lived with him, he left the bulk of his property to his second wife and to his children by her. The plaintiff is a grandson through a former wife, from whom the testator had been divorced.

App. Div.]

First Department, June, 1917.

Evidence examined, and *held*, insufficient to establish either lack of testamentary capacity, fraud or undue influence, and that a judgment for the plaintiff should be reversed and his complaint dismissed.

A declaration by the testator that he was transferring property to his wife with a view of protecting his children is no indication of his incompetence and is consistent with an intelligent judgment that he has sufficient confidence in his wife to look after her own and his children.

Nor is incompetence shown by his yielding to the suggestions of a friend who urged him not to satisfy certain mortgages on lands owned by a corporation which he controlled, so that his children should be less dependent upon their mother.

Mere age and the attendant impairment of physical and mental faculties does not make one incompetent to make a will.

Declarations made by the testator prior to the execution of the will, while competent on the question of testamentary capacity if not too remote, are mere hearsay, and, therefore, incompetent upon the issue of undue influence.

Declarations of the testator showing his state of mind a few hours before his death, when aroused from a comatose condition, shed no light on his state of mind at the time of the execution of a will, three months before, and especially so as respects the issue of undue influence.

Testimony by a nurse attending the testator in his last illness to the effect that the testator's wife stated that he talked and acted foolishly after receiving a slight injury, which declarations were made long subsequent to the execution of the will, would only be admissible for the purpose of impeaching the widow as a witness, after a proper foundation had been laid therefor by asking her if she had not so stated.

Quære, as to whether a legatee under a prior will of the testator is debarred by section 829 of the Code of Civil Procedure from testifying to declarations of the testator when making said will, where there was another will intervening between said will and that offered for probate, such witness not deriving his interest under an immediately preceding will.

In any event, such declarations to the effect that the testator did not feel free to state his views with respect to the disposition of his property in the presence of his wife and sister in law do not tend to show undue influence upon the testator at the time he executed a later will.

APPEAL by the defendants, Grace Felix Lesster and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of April, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 8th day of May, 1916, denying defendants' motion for a new trial made upon the minutes.

The action was brought to determine the validity of the

probate of a paper dated the 26th day of October, 1910, purporting to be the last will and testament of William C. Lesster, deceased.

Morgan J. O'Brien [Albert B. Boardman and Henry F. Herberman with him on the brief], for the appellants.

Eliot Norton [James F. Lynch with him on the brief], for the respondent.

LAUGHLIN, J.:

This action was brought by the grandson of the testator, pursuant to the provisions of former section 2653a of the Code of Civil Procedure, to determine the validity of the probate of the will. The plaintiff alleged that the testator was of unsound mind and incapable of making a will and that the execution of the alleged will was procured by fraud and undue influence on the part of testator's wife, Grace Felix Lesster, her sister, Mamie Felix, and one Louis Schrag, named as one of the executors, and other persons unknown to the plaintiff, who conspired together to that end.

The will was executed at the residence of the testator in the city of New York on the 26th day of October, 1910, and the testator died at St. Augustine, Fla., on the 27th day of January, 1911. The testator went to Florida accompanied by his wife, his two children, his mother-in-law and sister-in-law about thirteen days before his death. The certificate of death filed by the attending physician in Florida showed that death was caused by "Pulmonary Oedema Mitral Regurgitation Chronic Nephritis Pleurisy." The precise age of the testator was not shown, but the evidence indicates that he was about eighty-one years old. He was born in England and came to this country when a young man, and in 1868 married Josephine E. Morris, with whom he lived until 1904, when they were divorced by an Indiana decree. The only issue of that marriage was a son, Edward, who died in 1901, leaving the plaintiff, his son and only heir at law. The plaintiff was born at the testator's home where his parents then lived, and with the exception of a period of three years continued to reside there until after his mother's second marriage, when he was eleven years of age. The

App. Div.]

First Department, June, 1917.

testator owned a studio building in West Twenty-third street, New York city. Shortly before the divorce from his first wife the testator became acquainted with the young woman who subsequently became his second wife. She was the daughter of one of his tenants. At this time he was over seventy-five years of age, and she was twenty-one. They became engaged during the following month and were married on the twenty-second day of August of that year. There were born to them as the issue of the marriage the appellant William C. Lesster, Jr., in July, 1907, and the appellant Grace C. Lesster in August, 1910. About one year after the marriage the sister of the second wife came to live with them and she thereafter made their home hers. About five months after the marriage the testator made a will by which he left a legacy of \$100,000 to his wife, and directed that the residue of his estate be divided into twelve equal shares, six of which he gave to her, one to a sister, one to a nephew, three to three nieces *and the remaining one to the plaintiff*. On the 14th day of March, 1908, he executed a second will giving his wife all his household furniture and effects, and a legacy of \$100,000, and one-half of his residuary estate, and the other one-half in trust for his son until he should arrive at the age of twenty-five years, when he was to receive the principal. A codicil thereto was executed on the 1st day of July, 1908, and thereby the testator revoked the provisions with respect to the disposition of the *residue* of his estate, and directed the executors to convert it into money and to pay seven legacies of \$3,000 each, one to the husband of a deceased sister, one to a nephew, three to nieces, one to Judge Clinch, who was then his attorney and drew the will and codicil and the former will and possibly a third will, and *one* to the plaintiff, and gave the remainder to his wife; but in the event that she should not survive him he gave it in trust for his son. On the 28th day of June, 1909, he executed a third will, changing the provisions with respect to the disposition of the residue by dividing it into halves, and giving one-half to his wife and the other half in trust for his son until he should arrive at the age of thirty years. After the birth of the second child and on the 26th day of October, 1910, he executed the will now in question, by which he directed the payment of his debts and

funeral expenses, and gave a legacy of \$10,000 to his wife's sister, Mamie Felix, and left the residue to his executors in trust to pay the income to his widow until their "younger child" should arrive at the age of twenty-five years, provided his widow remained unmarried, and in the event of her remarriage the residue was to be divided and held in trust for his children until the younger reached the age of twenty-five years, when they were to take the principal and in the event of the death of one of the children before reaching the age of twenty-five years he gave a legacy of \$10,000 to his wife and to her sister. It thus appears that the only provision made by the testator for the plaintiff was in his first will and a much smaller legacy in the codicil to the second will. Of course the validity of the former wills and codicil has not been passed upon; but so far as appears they were the free acts of a competent testator and the uncontroverted evidence clearly shows this with respect to the codicil. The last will leaving substantially all his property to his wife and children has by the verdict been annulled evidently owing to his failure to continue some provision for the grandson.

The evidence tends to show that when the first will was made the testator was worth about \$300,000, and that before making the last will he had transferred and assigned to his wife property of the value in the aggregate of \$145,000 and then owned mortgages worth about \$110,000 and stocks and bonds estimated at \$50,000. A month prior to the execution of the last will the testator discontinued the services of Judge Clinch, who had been his attorney for about twenty years and employed one Elder, a member of the bar, who had been associated with Judge Clinch for a period of years prior to July of that year, to draw the last will. The cause assigned by the testator for making the fourth will was the birth of the second child. It was arranged that Elder should call at the decedent's house, which he did on the seventh day of October. At that time the decedent delivered to him a deed of the Twenty-third street property to his wife, which had been drawn by Judge Clinch, to have the same recorded; but nothing was said about the will. On the thirteenth of October there was another interview between Elder and the testator at the same place. The decedent had organized a

App. Div.]

First Department, June, 1917.

corporation known as the North American Realty Company, and he then owned and held all of the capital stock, excepting one share, issued to his sister-in-law, evidently to qualify her as a director. The company held the title to various parcels of real estate owned by the testator, and he held mortgages thereon. At this interview he announced his intention of transferring the property held by the company to his wife, and of satisfying the mortgages. Elder accordingly prepared the deeds and on the twenty-fourth of October brought them to the testator for execution. The deeds were signed by him that day, as president of the company. Elder also at the same time brought leases of the property to the testator for life to be executed by his wife, but she was not home. At the former interview with Elder the testator had stated, in effect, that his wife was to have all of his property ultimately, and that he desired to "Clean it all up" by transferring it to her, and accordingly Elder also brought satisfaction pieces of various mortgages, to be executed by the testator and an assignment of a mortgage to his wife. The testator was expecting one Schrag, a friend of his engaged in the real estate business, and before executing the satisfaction pieces he suggested awaiting Schrag's arrival on the ground that he desired the latter's advice as to whether he was taking the proper action. Schrag arrived shortly thereafter, and on looking over the papers suggested that the testator should make some provision for his children inasmuch as he had given so largely to his wife, to which the testator replied, "That is what I am doing this for," and said that he would make a will and that he had stocks and bonds of the value of \$50,000; but upon Schrag's suggestion that that was not sufficient, he determined not to satisfy the mortgages. Much is attempted to be made of this circumstance, and it is claimed that the declaration of the testator that he was transferring the property to his wife with a view to protecting his children indicates that he was incompetent. Manifestly there is no force in this argument. It is entirely consistent with an intelligent judgment that he had sufficient confidence in his wife that she would look after her own and his children. Nor is incompetence shown because he yielded to the persistent suggestions of Schrag and refrained from satisfying the

mortgages. At most that merely indicates that on the urgent request of his friend he deemed it wise to leave more of his property to his children thereby leaving them less dependent upon their mother.

The testator then gave directions with respect to the preparation of the will in question and directed that his wife and her sister be the executrices, but on the suggestion of Elder that he name an outsider — as he had named Judge Clinch in a previous will — the testator directed that Schrag be included as an executor and that it be provided that Elder be employed as attorney for the estate. Elder prepared a rough draft of the will and brought it to testator's house and it was read over and certain changes were made at the suggestion of the testator, and it was agreed as to who should be the witnesses; but the testator said he would not execute the will until his wife, who was out of town, knew about it, and it was arranged that Elder and Schrag and the latter's nephew, who was to be a witness, should call the next day. They called pursuant to the arrangement and at that time the testator's wife was home, and Elder, in the presence of the testator, informed her that owing to the birth of the second child the testator intended to make another will. She said that she did not see any necessity for it. He thereupon read the will to her, and she asked with respect to the change in the provision in the event of her remarriage, saying, "Then I don't get anything if I marry again," whereupon Elder drew her attention to the fact that considerable property had been transferred to her outright, and thereupon the testator, addressing her, said, "Are you satisfied?" to which she replied, "Yes; I suppose so; if you want to do it, it is all right," and he said, "Well, I want you to be satisfied," and she answered, "Yes; I am satisfied, and you can sign it if you want to." Elder then placed the will upon a table and the testator executed it. After the will was executed Elder stated to the wife of the testator that the latter desired to transfer certain real estate to her if she would give back life leases on the property and execute a mortgage on the Twenty-third street property in the sum of \$25,000 for which he would transfer to her mortgages referred to as the Sound Realty Company mortgages. She acquiesced and the papers were accordingly

App. Div.]

First Department, June, 1917.

executed. So far as appears, this was the condition of the testator's financial affairs at the time of his death. He held leases for life on the real property thus conveyed to his wife, and stocks and bonds the estimated value of which he gave as \$50,000. He also owned a first mortgage on the Twenty-third street property in the sum of \$35,000 and said mortgage for \$25,000.

He appears to have enjoyed unusually good health for one of his age. Beginning with the year 1904 he experienced difficulty with his heart owing to a leak of one of the valves, which continued until his death. That was one of the causes of death specified in the death certificate, and according to the evidence the other causes of death were related thereto. From this condition of his heart he occasionally suffered attacks which were very severe and exhaustive, involving great difficulty in breathing, and at one time he fell in a semi-unconscious condition and remained ill for some days. There is also evidence that his kidneys were affected and that he suffered from hardening of the arteries. In 1907 he sustained a fracture of the arm and in 1908 he had pleurisy. He was then confined to his house for some months, and in July, 1909, on the advice of his physician, he went to Bad Nauheim to take the baths for his heart. He returned in September apparently improved, but suffered an attack shortly thereafter. Three days before the execution of the will a step-ladder on which he was standing in his house, slipped, and he fell therefrom and sustained a cut on the scalp about one and one-half inches in length. His family physician was called in then. He testified that there was no fracture of the skull and no unconsciousness resulted. Two days after the execution of the will he had a severe convulsion, which the doctor testified was not due to the fall five days before, but to cerebro embolism, which indicated that some substance had been carried from the leaky valve in the heart to the brain where it lodged causing an accumulation of blood, and pressure. The testator at this time was confined to his house until the early part of December, when he was again able to be up and around, but required some assistance in walking. This was his condition when he went to Florida on the fourteenth of January following. On his arrival in Florida he was able to

be about alone for the first day or two but he then became seriously ill and a physician was called; and one Thornton, a nurse, was placed in attendance and remained with testator until his death. The family physician of the testator in New York testified that owing to the condition of the testator's heart he advised against his going out alone prior to the execution of the will, but his testimony shows that in his opinion the testator's mental faculties were unimpaired. There is evidence tending to show that the testator was feeble and that he failed promptly to recognize old friends and even to do so for some time after having been reminded of their names.

The court left the issues with respect to the competency of the testator and undue influence to the jury, and they rendered a general verdict. Unless mere age alone renders one incompetent to make a will there was no evidence upon which the impeachment of this will on the ground of incompetency can be sustained. There is no evidence that the condition of the testator's heart, which was the principal ailment from which he was suffering, affected his mentality, nor is there any evidence that his mind was materially affected by the feebleness of his body. The mere fact that his eyes, or his mental faculties, were without the alacrity of youth in recognizing relatives, friends and acquaintances, is not evidence of incapacity to make a will. Very many verbal declarations made by the testator from time to time before the will was executed and down to his death were received. They were for the most part mere declarations by him with respect to the attitude of his wife and her relatives and their supervision over him and his financial affairs. They did not tend to show incompetency at the time the will was made. It was, therefore, error to submit that issue to the jury. Such statements were competent as showing the testator's state of mind with respect to competency if not too remote, and toward his family and plaintiff; but as narratives they were hearsay and, therefore, incompetent evidence as to whether undue influence was exerted. (*Marx v. McGlynn*, 88 N. Y. 358, 375; *Matter of Green*, 67 Hun, 527, 542; *Waterman v. Whitney*, 11 N. Y. 157, 164; *Chambers v. Chambers*, 61 App. Div. 299, 308; *Shailer v. Bumstead*, 99

Mass. 112.) They were not, however, properly limited either when received or in the charge. The arguments of counsel for respondent on the issue of undue influence are for the most part predicated on incompetent evidence and facts and circumstances giving rise merely to suspicion. Thornton, the nurse, called by plaintiff, was permitted to testify over objection on the ground of incompetency, and exception duly taken by defendants, that about four hours before death the testator came out of the delirium in which he had been for some days, and asked for Elder, Schrag and the plaintiff, and was informed that he could not see them as they were in New York and he was in Florida, and on being asked whether he wished to see his wife and sister-in-law, replied that he did not, that "all they wanted was his money and it was money all the while," and asked that the door be locked, which was done; that testator was then propped up in bed so that he could see where he was, and that he then said he "wanted to fix things right for his grandson;" that he had not seen his grandson for some time and had not been allowed to see him; that he cried and carried on for some two hours, stating that everything was wrong, and that he had had an operation when he was about sixty-five and "had been a different man since," and "seemed to lose all vitality after that." This evidence was offered and received generally. In the charge the jury were instructed that it bore on both issues. That testimony was most prejudicial to defendants. In the circumstances the jury were justified in believing that it was direct competent evidence that the testator had been unduly influenced by his wife and her sister. Manifestly the declarations were not proof of the facts and it is quite evident that the state of the testator's mind a few hours before death, as shown by what he said on rousing from a comatose condition in which he had been for some days, shed no light on the state of his mind at the time of the execution of the will three months before. (See *Smith v. Keller*, 205 N. Y. 39; *Shailer v. Bumstead*, *supra*, 126, 127, 130.) In *Smith v. Keller* (*supra*) the Court of Appeals, in discussing this point, say: "Statements made by a testator tending to impeach a will previously made are too unreliable to be admissible as a basis for setting aside an instrument made under the formalities required by statute.

Such statements may be made for the express purpose of deception, or to satisfy impertinent curiosity and importunity or to express agreement with the suggestions of the questioner and thus satisfy the one to whom the declaration is made, or they may spring from a semi-morbid condition that in no way reflects the condition of mind or the purpose of the testator at the time the will was actually executed."

This same witness was permitted to testify over objections on the ground of incompetency and exceptions duly taken, to declarations alleged to have been made to him by the testator's wife while in Florida to the effect that decedent "talked foolishly, acted foolish since he had had this fall; * * * he acted foolish and said foolish things; * * * he had been foolish and talked foolish since the fall." That evidence was received as original evidence of the facts and was in no manner limited. Manifestly it was incompetent for that purpose because the declarations were made long subsequent to the execution of the will and the rights of other parties could not be impaired by her admissions affecting the validity of the will which must stand or fall as a whole. (*Matter of Myer*, 184 N. Y. 54; *Matter of Kennedy*, 167 id. 176.) The only possible theory upon which such evidence would be admissible would be to impeach the widow as a witness after a proper foundation had been laid therefor by asking her if she had not so stated, but although the widow was a witness, no such foundation was laid, and the evidence was not so limited, even after she was recalled and denied it. Like damaging evidence was received in the testimony of one Theiss over objection and exception duly taken with respect to its competency, and he was permitted to testify to declarations claimed to have been made in his presence by the wife of the testator to the effect that the doctors had ordered her to take him south and that she wished she could leave him there as she had obtained all his property.

Testimony was given by Judge Clinch, who had been the legal adviser of the testator, and had probably drawn all of the wills excepting the last, and who was called as a witness by the plaintiff, and was permitted to testify to declarations made to him by the testator tending to show that the latter did not feel free to state in the presence of his wife and sister-

App. Div.]

First Department, June, 1917.

in-law his views with respect to the disposition of his property. That testimony was received over objection and exception duly taken which present the question as to whether the evidence was competent under section 829 of the Code of Civil Procedure, the witness being a legatee under a prior apparently valid will of the testator with, however, another will intervening. Like testimony of another witness similarly situated was received. That is an interesting question in view of the authorities which hold generally that a legatee under a prior will is interested in the contest over the probate of a later will (*Pringle v. Burroughs*, 100 App. Div. 366; *affd.*, 185 N. Y. 375; *Matter of Smith*, 95 id. 516; *Matter of Jeffrey*, 129 App. Div. 791); but in all of those cases the witness derived his interest under an immediately preceding will. Here, however, the interest of the witnesses would not necessarily attach if the will now under consideration were invalid, but only in the event that the third will was also invalid. Subsequent to the decisions cited, the Court of Appeals, in *Franklin v. Kidd* (219 N. Y. 409), which, however, was not a will case, declared generally that the interest of a witness, to render him incompetent, must be such that it will be directly affected by the decision of the issue on which he is called to testify. We do not deem it necessary to decide whether that testimony was competent for we are of opinion that it does not tend to show the exercise of undue influence upon the testator with respect to the will under consideration.

Counsel for appellants, evidently in the expectation of showing that the widow and sister-in-law made no improper request with respect to having the testator advised concerning the disposition of his property, asked Judge Clinch on cross-examination whether the wife or sister-in-law ever requested him to give advice with respect to the testator's property which he deemed improper or felt compelled to refuse or attempted to influence him, and he answered in the affirmative. The matter was then dropped and it does not appear what advice they requested or what influence they attempted to exert. There is nothing to show that such advice or influence was with respect to the making of the will in question, or with respect to any disposition of the property of the testator now in

question. There is other evidence tending to show that the wife of the testator was somewhat active in attempting to alienate him from the plaintiff; but there is no competent evidence tending to show that there was any undue influence brought to bear upon the testator in procuring the execution of this will. There is here no presumption from the nature of the will and the existence of opportunity and interest that undue influence was exerted, for with the exception of the legacy of \$10,000 to the testator's sister-in-law, who lived with him, he left his property to his wife and children. (See *Marx v. McGlynn*, 88 N. Y. 357, 371.) We are of opinion, therefore, that the evidence was insufficient to require the submission of the case to the jury and that the court erred in denying appellants' motion for a dismissal of the complaint.

It follows that the judgment and order should be reversed, with costs, and the complaint dismissed, with costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Judgment and order reversed with costs, and complaint dismissed, with costs.

In the Matter of the Transfer Tax upon the Estate of
EDMUND D. TELLER, Deceased.

COMPTROLLER OF THE STATE OF NEW YORK, Appellant; LENA
TELLER, Individually and as Executrix, etc., Respondent.

First Department, June 8, 1917.

Tax — transfer tax — mortgages and moneys owned by husband and wife as joint tenants — subdivision 7, section 220 of Tax Law, construed.

Mortgages held by husband and wife "jointly and to the survivor of them" and also moneys, the proceeds of said mortgages, which have been deposited in a bank in the joint names of the husband and wife subject to withdrawal by the check of either, are, on the death of one of the joint tenants, subject to a transfer tax on the undivided half interest of the decedent, passing to the survivor.

Although subdivision 7 of section 220 of the Tax Law, as added by chapter 664 of the Laws of 1915, went into effect after said mortgages were executed,

App. Div.]

First Department, June, 1917.

said statute applies on the taxation of the transfer, for the undivided half interest only passes upon the death of a cotenant, and hence the statute is not made retroact ve.

APPEAL by the Comptroller of the State of New York from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 7th day of December, 1916, reversing a prior order fixing the transfer tax herein.

Alexander Otis [*Schuyler C. Carlton* with him on the brief], for the appellant.

Walter B. Solinger [*Fernando Solinger* with him on the brief], for the respondent.

LAUGHLIN, J.:

The testator died on the 23d of February, 1916, leaving by a last will and testament his entire estate, with the exception of some articles of jewelry, to his wife and naming her his executrix. He and his wife owned realty as tenants by the entirety but the appeal relates only to the personalty. The question presented for decision relates to whether certain of the *personal* property was owned by the testator and his wife as tenants in common or jointly and to what extent, if any, it is taxable.

The only evidence with respect to such ownership is contained in a schedule annexed to the affidavit of the executrix made in this proceeding for the determination of the tax to be paid, and the affidavit of one of her attorneys with respect to a certain mortgage omitted from the schedule. The property in question consists of a bank account and mortgages. It is stated generally in the schedule that jointly with his wife and subject to check by either of them he had a deposit account with the Broadway Trust Company of a specified amount upon which a specified amount of interest had accrued to the date of his death; that the money was partly the income derived from the rents of real estate owned by them as tenants by the entirety and partly the income of mortgages "held by them jointly and to the survivor of them;" that all deposits made in the account were used by

them for their "joint account without any apportionment as to the amount which either of them might use and without either accounting to the other for the manner in which it was used or the purpose for which the same was used;" and that the money belonged to them "as joint tenants, and upon the death of the decedent" the survivor became the sole owner thereof. There were six mortgages on real property, aggregating \$74,000 with \$1,244.09 accrued interest, all running to "Edmund D. Teller and his wife, Lena Teller," and that was also the recital of the habendum clause in each with the addition of the words "and the survivor." There was another mortgage for \$60,000 with \$1,310.15 accrued interest, running to them in the same form, but it does not appear that the habendum clause contained any reference to the survivor. The schedule, however, asserts ownership thereof in the widow as survivor. There was another mortgage, omitted from the schedule, for \$5,000 with \$40.48 accrued interest, running to them in the same form, but it does not appear that there was any reference in the habendum clause to the survivor although it is assumed in the briefs that it contains the same provision in the habendum clause as the six mortgages to which reference has been made.

The appeal presents the question as to whether the bank account and the mortgages were taxable, and if so to what extent, under the provisions of subdivision 7 of section 220 of the Tax Law (Consol. Laws, chap. 60, Laws of 1909, chap. 62), as added by chapter 664 of the Laws of 1915, which took effect on the twentieth day of May, that year. The provisions of that subdivision are as follows: "Whenever intangible property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety,

App. Div.]

First Department, June, 1917.

joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will." The mortgages were all executed prior to the enactment of the statute, but it does not appear when the bank account was opened or any of the money was deposited. The transfer tax appraiser held that the bank account and all of the mortgages were taxable for the full amount, but the Surrogate's Court ruled that they were held by the testator and his wife jointly and that the statute is not to be construed as retroactive, and, therefore, they were not taxable. When this appeal was argued it seemed necessary to decide whether the ownership of the property was in the testator and his wife as tenants in common or jointly; but a decision of the Court of Appeals in *Matter of McKelway* (221 N. Y. 15), I think, disposes of all the questions involved on this appeal. That proceeding involved the taxability of personal property held by McKelway and his wife jointly, some of which they acquired before and some after the enactment of this statute, and his death was subsequent to the time the statute took effect. There, as here, the tax appraiser ruled that the property was taxable for its full value as though it passed under the will, and the Surrogate's Court reversed the ruling on the theory that the only transfer from McKelway was during his lifetime on the creation of the joint tenancy and before the enactment of the statute. The Appellate Division affirmed (176 App. Div. 929), but the Court of Appeals reversed, holding that the property was taxable to the extent of one-half of its value, on the theory that a joint owner of *personal* property may dispose of his own interest during his lifetime, and that the doctrine of survivorship applies only if the jointure is not thus severed, and that, therefore, the absolute ownership of the undivided half of the joint property which the deceased joint owner might have disposed of passed to the survivor upon his death, and not until then. The effect of that decision is that the surviving joint tenant has at all times been the owner of an undivided half interest subject to the right of his cotenant to take by survivorship and that, therefore, that undivided interest was not taxable but that the survivor succeeds to

the absolute ownership of the other undivided half interest only by and upon the death of his cotenant, and that, therefore, such interest is taxable. On that construction of the statute no constitutional question arises, for it does not become retroactive; and since an undivided half interest would be taxable if they held the property as tenants in common the same result follows.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the order of the tax appraiser modified by imposing a tax to the extent of one-half the value of the interest taxed as reported by him, and as so modified, affirmed.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and order of tax appraiser modified as stated in opinion, and as modified affirmed. Order to be settled on notice.

FREDERIC FOYLE NUGENT, Appellant, v. JOHN R. ROWLAND, Respondent, Impleaded with WILLIAM SETON GORDON and Others, Defendants.

First Department, June 8, 1917.

Pleading — answer — counterclaim for conversion of promissory note set up in action on independent contract — allegations not constituting counterclaim for substantial or nominal damages.

A counterclaim set up by a defendant sued for the value of services and disbursements which alleges in substance that the defendant became an accommodation indorser for the plaintiff on a note without consideration and upon the plaintiff's agreement that he would use the note only for the purpose of renewing and retiring prior notes, and that the plaintiff, instead of so doing, permitted the former notes to go to protest so that the defendant was obliged to pay them and converted the renewal note to his own use and delivered it to a stranger "who claims to be a *bona fide* holder thereof in due course," should be dismissed as insufficient, there being no allegation that the defendant has paid the note or that the plaintiff who was primarily liable thereon is insolvent.

Said counterclaim does not set up a cause for conversion as the defendant did not own the note, and in any event the conversion would not

App. Div.]

First Department, June, 1917.

be a proper counterclaim in the action brought upon an independent contract.

Said counterclaim does not state facts entitling the defendant even to nominal damages.

APPEAL by the plaintiff, Frederic Foyle Nugent, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of February, 1917, denying his motion to dismiss the fourth counterclaim contained in the amended answer of the respondent and overruling his demurrer thereto.

Lilian Herbert Andrews, for the appellant.

Clarence De Witt Rogers, for the respondent.

LAUGHLIN, J.:

This is an action for services and disbursements in connection with the organization of the "Directors Trust Company of New York." Defendant Rowland, the respondent, joined issue on the material allegations of the complaint and set up in three counterclaims that he became accommodation indorser for the plaintiff on five notes which he was obliged to pay. In a fourth counterclaim he pleaded that he became accommodation indorser for plaintiff on a sixth note on which his indorsement was procured without consideration upon plaintiff's agreement that the note would be used only for the purpose of renewing and retiring the other five notes, and that, instead of using it in renewal or retirement of the other notes he permitted them to go to protest and respondent was obliged to pay them, and plaintiff converted the sixth note to his own use and delivered it to a stranger "*who claims to be a bona fide holder thereof in due course*;" that said sixth note was not paid at maturity and was duly protested and the holder threatens suit against respondent thereon, and that thereby he has been damaged in the amount of the sixth note, together with protest fees. Plaintiff demurred to the fourth counterclaim on the ground that it was not of the character specified in section 501 of the Code of Civil Procedure, and that it does not state facts sufficient to constitute a cause of action.

The respondent has not paid the note and it is not even alleged that the plaintiff, who is primarily liable thereon, is insolvent. It is contended in behalf of the respondent that the diversion of the note gave rise to a cause of action in his favor at his election to recover the amount of his liability on the note either in tort or for breach of the contract, and in support of that contention he cites *Thayer v. Manley* (73 N. Y. 305); *Davison v. Farr, Ward & Co.* (18 Misc. Rep. 124) and *Coit v. Stewart* (50 N. Y. 17), which I think are not in point. In *Thayer v. Manley* (*supra*) the action was by the maker against the payee for the conversion of a note alleged to have been obtained by fraud and it was held that the maker, without paying the note, had an election of remedies, either to sue in equity to enjoin the negotiation of the note and to have it canceled or to sue for the conversion thereof on defendant's failure to deliver it to him on demand, and that the satisfaction of the judgment in conversion would validate the note and authorize a recovery thereon. In *Davison v. Farr, Ward & Co.* (*supra*) the action was by an accommodation indorser against the maker who claimed that his indorsement was procured by fraud. There the note had been negotiated, and the indorser, on discovering the fraud, paid and took up the note and held it when he brought the action. Likewise, in *Metropolitan Elevated R. Co. v. Kneeland* (120 N. Y. 134), cited in *Davison v. Farr, Ward & Co.* (*supra*), it was held that a corporation might maintain an action against its directors for fraudulently issuing and negotiating its promissory notes on the ground that it was liable to the holders thereof, and that presumptively the face value of the notes was the measure of its damages. In *Coit v. Stewart* (*supra*) it was merely held that a principal whose agent converts his property has an election to sue for the conversion or for a breach of the contract of agency. Here, however, there was no conversion for the respondent did not own the note. Moreover, if he had a cause of action for the conversion of the note it would not be a proper counterclaim to this action on an independent contract.

It is insisted, however, that respondent's counterclaim is for the amount of his liability on the note on the ground that there was a breach of the contract by which his indorse-

ment was obtained; but even on that theory no damages are shown. This counterclaim does not purport to be and it is not claimed that it can be sustained for the amount of the other notes which were to be retired and which respondent has been obliged to pay. The other counterclaims present his cause of action for having been obliged to pay the five notes which were to be renewed and retired. But it is contended that the mere breach of the contract gave rise to a cause of action for nominal damages at least. In *Pecke v. Hydraulic Construction Co.* (23 App. Div. 393) it was unanimously stated by this court that a counterclaim under section 501 of the Code of Civil Procedure must be upon a cause of action which will *materially* diminish the plaintiff's recovery, and that a counterclaim for nominal damages is not authorized. It was, however, stated by the Second Department in *Coppola v. Kraushaar* (102 App. Div. 306), without citing or considering *Pecke v. Hydraulic Construction Co.* (*supra*), that a counterclaim for nominal damages is authorized. Manifestly this counterclaim was not pleaded upon the theory that the respondent was entitled to nominal damages, for if he had brought an action on the counterclaim and it had been held that he was entitled to recover nominal damages only, he would have been mulcted in costs, less six cents; and if the complaint had been dismissed an appellate court would not reverse the judgment to entitle him to recover nominal damages. (*Devendorf v. Wert*, 42 Barb. 228.) There are cases holding that a demurrer for insufficiency will not be sustained to a complaint showing a cause of action for only nominal damages. (*Mills v. Gould*, 42 N. Y. Super. Ct. 119. See, also, *Quin v. Moore*, 15 N. Y. 434.) It is not necessary in the case at bar to decide whether a counterclaim for nominal damages is authorized, for we are of opinion that the facts alleged in the counterclaim do not show that the respondent is entitled to recover even nominal damages for the wrongful diversion of the note. It is not alleged that the party who holds the note parted with value or obtained it before maturity, or even that he was a holder in due course but merely that he claimed to be; and, therefore, in an action against the respondent on the note proof of the wrongful diversion would be a defense, unless the holder showed that

he took it in due course, for value and before maturity. (Neg. Inst. Law [Consol. Laws, chap. 38; Laws of 1909, chap. 43], §§ 91, 98.) For aught that appears payment of the note may be enforced against the plaintiff, or if enforced against the respondent he may recover of the plaintiff. If, therefore, respondent should be permitted to recover the amount of the note before paying it payment may be enforced against the plaintiff who would then have no redress against the respondent.

It is, therefore, evident that the counterclaim is not good on the theory on which it has been pleaded, namely, for the recovery of the amount of the diverted note. The only question, therefore, is whether the respondent in addition to his counterclaims for the amount paid on the other five notes has a cause of action for nominal damages for the breach of the contract in diverting the sixth note. In the circumstances we are of opinion that on the facts alleged respondent has not yet even sustained nominal damages on that theory.

It follows that the order should be reversed, with ten dollars costs and disbursements, and plaintiff's motion for dismissal of the fourth counterclaim granted, with ten dollars costs.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and defendant's motion denied and plaintiff's motion granted, with ten dollars costs.

ABRAHAM SCHULDER and WILLIAM SCHULDER, Doing Business as A. SCHULDER & SON, Respondents, v. EDWARD R. LADEW COMPANY, INC., Appellant.

First Department, June 8, 1917.

Sale — delivery of goods after time set therefor — waiver of time limit set for performance — subsequent refusal of vendor to deliver balance of goods.

Although goods to be delivered under a written contract of sale were, by the terms of the contract, to be taken by the vendee within six months, where as a matter of fact the time limit was not insisted upon by either

App. Div.]

First Department, June, 1917.

party and the vendor, after the expiration thereof, delivered installments of the goods which were accepted by the vendee, there was a waiver of the time limit, and the vendor when sued for a subsequent refusal to complete the contract cannot escape liability for the breach on the theory that it was at liberty to repudiate the contract at any time subsequent to the expiration of the six months' period and to demand a higher price for the balance of the goods.

Where the continuance of the performance of a contract is permitted after the expiration of the period of performance, the party who might have elected to insist upon the performance within the time agreed upon is deemed to have waived the time for performance and if he thereafter desires to limit the time for performance it is incumbent upon him to give notice requiring performance within a reasonable time. Such rule is binding equally upon vendor and vendee.

APPEAL by the defendant, Edward R. Ladew Company, Inc., from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 8th day of January, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 11th day of January, 1917, denying defendant's motion for a new trial made upon the minutes.

Frank L. Crocker, for the appellant.

Samuel Bitterman, for the respondents.

LAUGHLIN, J.:

This is an action to recover damages for breach of a contract in writing made between the plaintiffs and the estate of Edward R. Ladew upon the 7th of October, 1913. On the 16th of September, 1913, said estate, by a letter addressed to the plaintiffs referring to negotiations resting in parol, advised plaintiffs that the estate would accept an order for 200,000 feet of five-sixteenths inch gold-tan belting to be taken on or before January thirty-first at the price of forty-two dollars per 1,000 feet. The contract upon which the action is based is in the form of an order by plaintiffs and addressed to said estate, the body of which is as follows: "Please ship the following: 200,000 feet 5/16" full Gold Tan Belting @ \$42.00 per M feet, to be taken in 6 months. 20,000 ft. 1/4" Gold Tan @ \$28.80."

The order was accepted by the Ladew estate by entering

the same upon its books and transmitting it to the factory for manufacture and by delivering 32,500 feet of the belting within the six months. Within the specified period of six months and in March, 1914, the defendant was incorporated and succeeded to the business of the Ladew estate and took over this contract, and thereafter and after the expiration of the six months' period and from time to time down to the month of January, 1915, the defendant delivered to the plaintiffs pursuant to the contract 30,293 feet more of the five-sixteenths inch belting, leaving 137,207 feet undelivered. The one-fourth inch belting is not involved. The order appears to have been construed by the parties as calling for shipments in installments from time to time as required by plaintiffs; and specifications of the quantity desired were given from time to time by letter and by telephone. No questions arose between the parties concerning the expiration of the specified period of six months and in so far as specifications were subsequently given by plaintiffs and deliveries made by defendant they were concededly made and delivered pursuant to the contract on the theory that it continued in force. On the 12th of January, 1915, the defendant wrote plaintiffs stating that it withdrew all prices and would be glad to quote new prices. Neither before writing that letter nor thereafter did the defendant tender delivery of the unfilled part of the order or give the plaintiffs notice limiting the time for taking the same. At the time the defendant thus refused to make further deliveries pursuant to the contract the market price of the belting had increased eight dollars per 1,000 feet over the contract price.

The plaintiffs have recovered on the basis of this difference in price on the theory that by the action of the parties the contract continued in force and the specified time was waived. The facts were submitted to the court by motions for the direction of a verdict, but the court submitted to the jury the question as to whether the parties intended to continue the contract in its entirety and the jury found that they did. The defendant, admitting that the deliveries subsequent to the expiration of the period of six months were made pursuant to the contract, contends that such action continued the contract merely with respect to the deliveries made, but that

App. Div.]

First Department, June, 1917.

it was at liberty at any time subsequent to the expiration of the six months' period, notwithstanding the fact that it had accepted specifications and made deliveries after that period, to decline to accept further specifications or to make further deliveries, in the absence of an express agreement or a new consideration or express evidence upon which an estoppel may be predicated. If the defendant were suing the plaintiffs for a breach of the contract in failing to accept deliveries tendered after the expiration of the specified period and it appeared, as it does here, that the plaintiffs had made specifications and accepted deliveries in recognition of the contract after the expiration of the period specified, without calling on the defendant for the delivery of the balance or giving the defendant notice requiring it to deliver within a reasonable time, I think there could be no question under the authorities but that the plaintiffs would be precluded from preventing full performance by the defendant and would be answerable to the defendant under the contract subject to any claim for damages sustained by the plaintiffs in consequence of its failure to perform within the time specified. The general rule is that where the continuance of the performance of a contract is permitted after the expiration of the period for performance the party who might have elected to insist upon performance within the time agreed upon is deemed to have waived the time for performance and it is incumbent upon him, if he thereafter desires to limit the time for performance, to give notice requiring performance within a reasonable time. (*St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 98; *Deeves & Son v. Manhattan Life Ins. Co.*, 195 id. 324; *Kelly v. St. Michael's Roman Catholic Church*, 148 App. Div. 767; *General Supply & Construction Co. v. Goelet*, 149 id. 80; *Barnett v. Sussman*, 116 id. 859; *Murray v. Harbor & Suburban B. & S. Assn.*, 91 id. 397; *Lawson v. Hogan*, 93 N. Y. 39.) No authority is cited where this precise question arose with respect to a contract for the sale of goods, but in *Williston on Sales* (§§ 467, 458) the author states the rule to be that the acceptance of further performance after a breach operates as a waiver of the right of the party so accepting performance to prevent full performance. Where time of performance is waived by

the action of the parties no new agreement or consideration is required nor is it essential that a technical estoppel be shown. (*Clark v. West*, 193 N. Y. 349, 360; *Thorne v. French*, 4 Misc. Rep. 436; *affd.*, 143 N. Y. 679; *Toplitz v. Bauer*, 161 id. 325, 333; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 id. 190, 194, 195.) It is, however, fairly to be inferred here that the defendant led the plaintiffs to believe that it regarded the contract still in force and would make deliveries of the unfilled part of the order when required by the plaintiff. Under the authorities cited it is quite clear, I think, that the defendant could have held the plaintiffs to performance notwithstanding the expiration of the specified period for delivery. If the contract remained binding at all it was mutually binding.

It follows, therefore, that the judgment and order should be affirmed, with costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Judgment and order affirmed, with costs.

FRANCIS P. SHERWOOD, as Trustee in Bankruptcy of HOLBROOK & SCHAEFER, INC., Respondent, v. THEODORE S. HOLBROOK and Others, Appellants, Impleaded with HOLBROOK & SCHAEFER, INC., Defendant.

First Department, June 8, 1917.

Pleading — bankruptcy — action by trustee against corporation, its officers and transferees to set aside transfers — complaint stating cause of action — when no misjoinder of parties defendant.

The complaint of a trustee in bankruptcy in an action brought against a corporation, its officers and other defendants to whom assets were transferred, states a cause of action against all of the defendants where it in substance alleges that said officers of the corporation paid certain moneys of the corporation to the other defendants without consideration other than the discharge of antecedent unsecured debts so that their claims were paid in full and that to the knowledge of the defendant officers the corporation was at that time insolvent and that said payments were made in violation of section 66 of the Stock Corporation Law of the State

App. Div.]

First Department, June, 1917.

of New York and will effect a preference to creditors unless they are set aside and that such payments were made and received with the intent of effecting such preference when the insolvency of the corporation was imminent.

Such complaint need not allege that the corporation had defaulted on its notes or other obligations within the contemplation of section 66 of the Stock Corporation Law.

The appointment of the plaintiff as trustee in bankruptcy of the corporation dispensed with reducing the claims of creditors to judgments.

Said complaint states but a single cause of action in equity and there is no misjoinder of parties defendant although they are not equally liable and they are not all concerned in the same illegal transfers of the property of the bankrupt.

APPEAL by the defendants, Theodore S. Holbrook and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of February, 1917, overruling the separate demurrers of certain of the defendants to the complaint.

Harold H. O'Connor [*Nicholas A. Donnelly* with him on the brief], for the appellants Theodore S. Holbrook and Edward Schaefer.

Jerome C. Lewis, for the appellant Anna M. Schaefer.

George W. Tucker, Jr. [*William O. Gantz* with him on the brief], for the appellant Frederick M. vom Saal.

Guthrie B. Plante [*Charles E. Mahony* with him on the brief], for the respondent.

LAUGHLIN, J.:

This is an action by the trustee in bankruptcy of Holbrook & Schaefer, Inc., to compel the defendants to account for property of the bankrupt corporation alleged to have been transferred by some of them as officers of the corporation and to have been received by the others when to their knowledge the corporation was insolvent and about to suspend business. All of the appellants with the exception of vom Saal were officers and directors of the corporation and he was the brother-in-law of Edward Schaefer.

It is alleged that Theodore S. Holbrook and Edward Schaefer, acting respectively as president and treasurer of the corporation, made certain payments of moneys of the corporation to Anna M. Schaefer on the 13th and 16th of February, 1915, and to vom Saal on the sixteenth, seventeenth and eighteenth days of the same month without consideration other than the discharge of antecedent, unsecured debts, and that such payments paid the indebtedness owing by the corporation to Anna M. Schaefer in full and to vom Saal in full with the exception of \$1,000; that the corporation was at the time specified indebted to other creditors in amounts aggregating \$33,294.94 and that the value of its remaining assets would not exceed the sum of \$9,170.86, all of which was known to the defendants; that on the 25th of February, 1915, the corporation executed a general assignment for the benefit of its creditors, and on the twenty-fourth of June of that year certain of its creditors, including vom Saal, filed a petition in bankruptcy against it under which it was adjudicated a bankrupt on the eighth of July; that said payments were made in violation of the provisions of section 66 of the Stock Corporation Law of New York, and unless they are set aside they will have effected a preference to the creditors to whom the payments were made over the other creditors; and that such payments were made and received with the intent of effecting the preference, and that the corporation was then insolvent or its insolvency was imminent. Vom Saal demurred on the ground of misjoinder of causes of action, and the other appellants demurred on that ground and on the further ground that the plaintiff fails to state facts sufficient to constitute a cause of action against them.

It is contended that the demurrers should have been sustained on the ground that the plaintiff has not alleged that the corporation had defaulted in the payment of its notes or other obligations within the contemplation of the 1st sentence of section 66 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61). That point, however, has been authoritatively decided against the appellants' contention, for we held in *Caesar v. Bernard* (156 App. Div. 724) that the 2d sentence of the section relating to the conveyance, assignment or transfer of property

App. Div.]

First Department, June, 1917.

was not limited by the 1st sentence, and the Court of Appeals affirmed on our opinion in 209 New York, 570. The 2d sentence of the statute, so far as material, provides as follows: "No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid." The statute further provides among other things as follows: "Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. * * * Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. * * * No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

It is perfectly clear that the plaintiff alleges a cause of action against all of the defendants under these provisions of the statute, and his appointment dispensed with reducing the claims of the creditors to judgments. (*Southard v. Benner*, 72 N. Y. 424.) The plaintiff represents all of the other creditors of the corporation. On the facts alleged, by the express provisions of the statute the transfers of the property of the corporation were void and those who received it are bound to account to the creditors therefor. Likewise, by the express provisions of this statute the directors and officers concerned in the violation are liable to the creditors to the full extent of the loss sustained; and by the express provisions of section 91a of the General Corporation Law (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], as added by Laws of 1913, chap.

633) the directors and officers may be called to account in equity for the property thus transferred by them in violation of law.

The only possible question there can be, therefore, is with respect to the right to join all of the defendants in a single action; but in view of the statutory provisions I think it is quite clear that they may be so joined. The theory of the statutes is that the assets of a corporation constitute a trust fund for the benefit of its creditors (See *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99) and that its officers who dissipate them when it is insolvent or its insolvency is imminent and those who receive the property with notice and without parting with a valuable consideration must restore it to the corporation for the benefit of its creditors. (*Cullen v. Friedland*, 152 App. Div. 124. See, also, *Cole v. M. I. Co.*, 133 N. Y. 164.) The complaint, therefore, presents but a single cause of action in equity to have the transfers declared void and to recover the assets of the corporation which have been transferred in violation of the statute, and it is immaterial that the defendants are not equally liable and that they were not all concerned in the same illegal transfers of the property of the bankrupt. (*Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Hatch v. Heinze*, 172 App. Div. 675; *Stiefel v. New York Novelty Co.*, 14 id. 371; *German American Coffee Co. v. Diehl*, No. 2, 86 Misc. Rep. 547; affd., on Mr. Justice PAGE's opinion at Special Term, 168 App. Div. 913.)

It follows, therefore, that the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE CREAMERY PACKAGE MANUFACTURING COMPANY, Appellant, v. GEORGE H. HORTON and SARAH J. HORTON, Respondents.

Third Department, May 2, 1917.

Conditional sale — failure to file — title of conditional vendor as against third party in possession — bankruptcy — title of trustee in bankruptcy of vendee — discharge — provability and release of claim for conversion.

The failure to file a conditional contract of sale does not, as between the parties, affect the validity of the vendor's title.

Where the conditional vendee of a silo placed it upon lands owned by his wife, where it was cemented to a concrete base and connected to the barn, but in such a manner that it could be detached and removed without causing any serious damage to the realty, and she failed to establish that she was a purchaser in good faith and that she had no knowledge of the condition of the contract, and had parted with value or lost some right on account of the annexation of the silo to her premises, the title remained in the conditional vendor as against her.

Where, after the annexation of the silo to the realty, the vendee was adjudicated a bankrupt, his trustee acquired no lien on the property and could not impeach the validity of the contract for failure to file the same.

The filing of the petition in bankruptcy did not bring into existence a claim in favor of the conditional vendor against the vendee and his wife for a conversion, and where such liability did not arise or become fixed until a demand and refusal for the property, made three months after the petition was filed, a claim therefor was not provable in bankruptcy and was not released by the discharge.

LYON and COCHRANE, JJ., dissented on opinion of McCANN, J., at Trial Term.

APPEAL by the plaintiff, The Creamery Package Manufacturing Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Broome on the 26th day of January, 1917, upon a decision of the court dismissing the complaint on the merits after a trial before the court without a jury.

The action was brought to recover damages resulting from the alleged conversion of a silo. When the action came on for trial the parties submitted an agreed statement of facts, and supplemented it by evidence taken before a referee, upon the question whether the defendant Sarah J. Horton had knowledge of the terms of the contract at the time of the

execution of the contract, or when the silo was put upon her lands.

The most material facts as set forth in the written stipulation are as follows: On the 20th day of August, 1912, the plaintiff, under a written contract, sold and delivered to the defendant George H. Horton a silo. Fifty dollars of the purchase price was to be paid upon delivery of the silo and the remainder, \$181.50, in two installments, one-half October 1, 1913, and one-half October 1, 1914. It was expressly agreed "that the title to the said silo as personal property shall remain in the Creamery Package Mfg. Co. until fully paid for, according to the terms of sale, and the delivery of said silo is conditional upon such agreement." The contract was never filed in any clerk's office, as required by the Personal Property Law (Consol. Laws, chap. 41 [Laws of 1909, chap. 45], § 62 *et seq.*), and no other payment was made by the defendant.

After the delivery of the silo to the defendant George H. Horton, and sometime prior to October 1, 1912, it was placed by him upon lands owned by the defendant Sarah J. Horton, where it has since been and now is in the possession of the defendants. It was placed within two or three feet of the cow barn upon said lands by placing it "upon a cement foundation, constructed especially for the support of the silo and independent of any other foundation or building, the foundation extending six feet underground and from six inches to two feet above the surface. The silo is 28 feet high above the cement foundation and is cylindrical in shape, 14 feet in diameter. * * * It is cemented to the concrete base on the inside by a strip of concrete extending around the base and up the side for a distance of four inches. * * *

"On the side of the silo nearest the barn were a series of openings in the silo the full height of it. For the purpose of communication between the silo and the barn, about two feet in width of the siding boards were removed from the barn, as well as a part of a sleeper or beam, and the opening between the barn and the silo was boarded up the full height of the silo to keep out the wind and weather, the boards being nailed to the silo and to the barn. If the silo and cement base were removed, the barn might be restored to its original

condition by replacing the siding boards, removed for the purpose of communication between the barn and the silo, and replacing the portion of the sleeper or beam."

In July, 1915, George H. Horton was adjudged a bankrupt in the United States District Court and on the 26th day of January, 1916, a decree was made and entered in that court discharging him from all debts which existed July 19, 1915, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy. The plaintiff's claim for the unpaid purchase price was included by the bankrupt in his list of debts and due notice of the bankruptcy proceeding served on the plaintiff.

On the 20th day of October, 1915, a demand was duly made upon the defendants for the delivery to the plaintiff of said silo, but the defendants refused to deliver or surrender possession thereof to the plaintiff. The court found these facts and that the defendant Sarah J. Horton had knowledge of the terms of the contract at the time of its execution and at the time the silo was placed upon her lands.

T. B. & L. M. Merchant [*Leslie J. Waite* of counsel], for the appellant.

Edward F. Ronan [*George M. Le Pine* of counsel], for the respondents.

SEWELL, J.:

There is no doubt that, as between the plaintiff and the defendant George H. Horton, the failure to file the contract did not affect the validity of the plaintiff's title to the silo. It is equally clear that the title to it remained in the plaintiff as against the defendant Sarah J. Horton, as it appears that the silo could be detached and removed without causing any serious damage to the realty and she failed to meet the burden imposed upon her of showing that she was a purchaser in good faith, that she had no knowledge of the condition of the contract and had parted with value or lost some right on account of the annexation of the silo to her premises. (*Hopkins v. Davis*, 23 App. Div. 235; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 160 id. 373; *Davis v. Bliss*, 187 N. Y. 77; *Central Union Gas Co. v. Browning*, 210 id. 10.)

Third Department, May, 1917.

Upon the facts in the record we also think that the in bankruptcy acquired no lien on the property, and, it could not impeach the validity of the contract for no He acquired no more, or any other or further right any creditor of the bankrupt could have acquired by or equitable proceeding under the statutes of this State. (*Dooley v. Pease*, 180 U. S. 126; *Thompson v. Fairbanks*, 196 id. 516; *Humphrey v. Tatman*, 198 id. 91; *Mattley v. Wolfe*, 175 Fed. Rep. 619.)

It does not appear that any creditor could have secured a levy by execution upon the property. There is nowhere in the record any suggestion that there was a creditor of the vendee for more than two years after the silo was attached and after it had become, on account of its nature and the manner of its annexation to the realty, a part of it as to all persons except the parties to this action.

According to our view of the conceded facts of this case the trustee in bankruptcy is in the same position he would have been if the defendant Sarah J. Horton had purchased the silo of her codefendant and obtained a delivery of it before any debt had been contracted by him. It is plain that he would then be in the situation of every creditor who comes with an execution after his debtor has in some way parted with or become divested of his property.

There is no force in the contention of the respondent that the plaintiff's claim for conversion was provable in the bankruptcy proceeding and was released by the discharge. The defendant came lawfully into possession of the silo. The attachment of it to the realty, in the manner it was attached, was not, under the circumstances, a conversion *per se*. There is nothing to show that the possession of the defendants was in hostility to the plaintiff's rights, or that it was not in protection of the plaintiff's interest until the demand and refusal three months after the adjudication in bankruptcy. The filing of the petition in bankruptcy did not bring into existence a claim in favor of the plaintiff against the defendants for a conversion. That liability did not arise or become fixed until three months after the petition was filed, when the wrong was done. Until then, the bankrupt or his trustee, if he had one, could have paid the amount due and become

App. Div.]

Third Department, May, 1917.

the owner. Neither did so and, therefore, the title remained in the plaintiff. By the provisions of the Bankruptcy Act there must be a fixed liability at the time of filing the petition. (*Phenix Nat. Bank v. Waterbury*, 197 N. Y. 161.)

The case at bar is clearly distinguishable from *Crawford v. Burke* (195 U. S. 176) and *Wood v. Fisk* (215 N. Y. 233). In each of these cases a cause of action for conversion was complete at the time of the bankruptcy.

We think the defendants failed to make out a defense to this action and, therefore, the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except LYON and COCHRANE, JJ., who dissented on opinion of McCANN, J., at Trial Term.

Judgment reversed and new trial granted with costs to appellant to abide event.

ARBA R. FINKLE, Respondent, v. NANNING V. LASHER,
Appellant.

Third Department, May 2, 1917.

Principal and agent — sale of milker outfit — adoption and confirmation of statements made by agent.

A person who accepts the benefit of a contract cannot be heard upon the trial of an action brought to charge the other party thereto with liability thereunder to question the authority of the agent who made the contract in his behalf.

Hence, where in an action to recover the balance claimed to be due on account of the sale and delivery by the plaintiff to the defendant of a milker outfit, it appears that when the plaintiff first called upon the defendant in respect to the sale, he brought a salesman for the manufacturer, and stated to the defendant that he had brought him there to talk "machine" to him, and that all of the representations and statements were thereafter made by said salesman, the plaintiff, by asserting his claim, adopted and confirmed all that the salesman said and did in inducing the sale.

APPEAL by the defendant, Nanning V. Lasher, from a judgment of the Supreme Court in favor of the plaintiff,

entered in the office of the clerk of the county of Montgomery on the 2d day of October, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 7th day of December, 1916, denying defendant's motion for a new trial made upon the minutes.

George M. Albot, for the appellant.

Gilbert R. Hughes, for the respondent.

SEWELL, J.:

This action was brought to recover \$270.44, the balance claimed to be due by the plaintiff, on account of the sale and delivery by the plaintiff to the defendant of a Sharples Milker Outfit.

The answer admits "That on or about the 5th day of December, 1914, the defendant purchased from the plaintiff, and the plaintiff delivered to the defendant the Sharples Milker Outfit, described in the complaint herein," and that the agreed purchase price was \$370.44, of which the defendant paid the plaintiff \$100 at the time of the sale. The answer alleges, by way of counterclaim, a warranty by the plaintiff that the outfit had sufficient power to do the work for which it was designed, and that it would successfully milk the defendant's cows and not make sore or injure the teats or udders of the cows milked therewith; that the defendant relied upon said representations and warranty and was thereby induced to purchase the outfit. Then follows an allegation of a breach of the warranty and that by reason thereof the defendant sustained damages in the sum of \$2,000. It will be observed that the parties by their pleadings have determined that the relation of buyer and seller existed between them.

It was not disputed that when the plaintiff first called upon the defendant, in respect of a sale of the outfit, he brought Charles T. Hughes with him and then said to the defendant that he had "brought Mr. Hughes there to talk milking machine to" him. It appears that Hughes was at that time a salesman for the Sharples Separator Company, which manufactured the outfit, and that all of the alleged

App. Div.]

Third Department, May, 1917.

representations and statements were thereafter made by Hughes in negotiating with the defendant for the sale of the outfit.

The defendant proved these statements and representations, and then offered evidence tending to show a breach of the warranty and the damages that had resulted therefrom. This evidence was objected to by the plaintiff and excluded. When the defendant rested, the plaintiff moved for a direction of a verdict on the ground, among others, that no warranty was made by the plaintiff, and if any warranty was made it was the warranty of the Sharples Separator Company. Before it was directed the defendant's counsel asked to go to the jury upon the question of the plaintiff's warranty and all the questions raised by the pleadings and under the evidence offered. The request was refused and the court thereupon directed a verdict for the plaintiff for the full amount claimed.

The only question which it is necessary to discuss is whether, as between the plaintiff and the defendant, Hughes was the agent of the plaintiff in respect of the sale.

It would be a strange rule of law which would permit the plaintiff, after availing himself of the representations of Hughes respecting the character, quality and efficiency of the outfit to make a sale by which he was benefited to the extent of the profit, to repudiate them so far as they imposed any burden or obligation upon him. There is no doubt that a person who accepts the benefit of a contract cannot be heard upon the trial of an action brought to charge the other party thereto with liability thereunder, to question the authority of the agent who made the contract in his behalf. If Hughes was not and did not in fact act as the agent of the plaintiff, the latter has no claim upon the defendant, for there was no other relation existing between them upon which the plaintiff could predicate any claim upon the defendant for the purchase price of the outfit. The plaintiff by asserting his claim to the amount to be paid for it, adopted and confirmed all that Hughes said and did in inducing the sale. The plaintiff could not adopt a part of his acts done or statements made without adopting all. It is clear that the court was not justified in holding, as a matter of law, that

Hughes did not represent the plaintiff, or that the defendant was not justified in believing that he had actual authority to act and speak for the plaintiff.

It follows that the judgment must be reversed and a new trial granted, with costs to abide the event.

All concurred.

COCHRANE, J. (concurring):

I concur in the result because Hughes expressly warranted the outfit in the presence of the plaintiff when the latter was negotiating the sale thereof with the defendant. The plaintiff must, therefore, be deemed to have adopted and ratified what Hughes said in his presence. The written contract of sale subsequently made between the parties stated that it was subject to the guaranty printed on the reverse side thereof. Such guaranty related to a different matter and apparently did not include the matter which was the subject of the express warranty of Hughes, and which the defendant alleged in his answer and was seeking to establish at the trial. The rule therefore excluding prior oral negotiations may not be invoked by the plaintiff. That rule has no application to a collateral undertaking such as an express warranty where the prior oral negotiations do not supplement or contradict what has been expressed in writing but relates to something in respect to which the written contract is silent. (*Chapin v. Dobson*, 78 N. Y. 74; *Vaughn Machine Co. v. Lighthouse*, 64 App. Div. 138, 143; *Van Publishing Co. v. Westinghouse, Church, Kerr & Co.* 72 id. 121, 126.)

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

In the Matter of the Judicial Settlement of the Account of
JESSIE S. VAN RIEMPST, as Executrix, etc., of ELIZABETH
F. TERRY, Deceased.

WARREN MCARTHUR and Others, Appellants; JESSIE S.
VAN RIEMPST, as Executrix, Respondent.

Third Department, May 2, 1917.

**Will — construction — when terms “nephews and nieces” do not
include grandnephews and grandnieces — gift by implication.**

The terms “nephews and nieces” in their primary and ordinary sense do not include grandnephews and grandnieces or more remote descendants unless there is something in the will to show that the words were used in the broader sense.

Where a will by express terms in different clauses gives property to the “nephews and nieces” of the testatrix, and the language used is not of a doubtful or uncertain effect, the other parts of the will cannot be resorted to to determine the meaning of said words.

Provisions of a will examined, and held, that it was the intention of the testatrix to use the terms “nephews and nieces” in their primary and ordinary sense, and that said terms did not include the children of a deceased nephew.

In order to support a gift by implication, the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to present no other reasonable inference.

APPEAL by Warren McArthur and others from parts of a decree of the Surrogate's Court of the county of Columbia, entered in the office of said Surrogate's Court on the 9th day of February, 1917, construing the will herein.

The will was executed April 19, 1915. The testatrix died December 26, 1915, leaving as her only surviving next of kin one brother, eighteen nephews and nieces, children of deceased brothers and sisters and the respondents, and Sanford G. Hoysradt, Caroline H. Whitbeck and Gertrude McE. Whitbeck, children of Albert Hoysradt a deceased nephew. There were also fifteen or more grandnephews and grandnieces, children of the nephews and nieces mentioned in the will.

By her will, after providing for the payment of her debts and funeral expenses, she gave, by the 3d clause therein, “to Sanford G. Hoysradt, Caroline Whitbeck and Gertrude

McE. Whitbeck, children of my deceased nephew, Albert Hoysradt, the sum of one hundred and sixty-six dollars each."

By the 4th clause she gave "to my niece Indianna McArthur, the sum of five hundred dollars." By the 5th clause she gave "to my great niece, Elizabeth Folger McArthur, daughter of George P. McArthur, the sum of two hundred dollars." By the 6th, 7th and 8th clauses she gave to seventeen nephews and nieces therein named, and to Sarah G. Bradley, a stranger in blood, "two hundred dollars each." By the 9th clause she gave to a Sunday school the sum of \$200. In the 10th clause she bequeathed her wearing apparel and jewelry to her executrix in trust. By the 11th clause she created a trust fund of \$2,000 for the benefit of her brother John A. McArthur, and provided therein that at his death the said \$2,000 should be divided "among my nephews and nieces who shall then be living, share and share alike." By the 12th clause she created another trust fund of \$3,000 for the benefit of her brother Robert McArthur, and provided therein that at his death the said \$3,000 should be divided "among my nephews and nieces, who shall then be living, share and share alike."

The 13th clause is as follows: "All the rest and residue of my estate I give, devise and bequeath to my nephews and nieces to be divided between them in equal shares."

The court found that the testatrix intended that the children of her deceased nephew Albert Hoysradt, mentioned in the 3d clause of the will, should share *per capita* with the nephews and nieces in the residuary estate including the principal of the two trust funds, the brothers John A. McArthur and Robert McArthur having died before the proceeding for an accounting was commenced.

Samuel B. Coffin, for the appellants.

John V. Whitbeck, Jr., for the respondent.

SEWELL, J.:

We think that the conclusion reached by the Surrogate's Court is not correct. Nothing is better settled in the law of wills than that the terms "nephews and nieces" in their primary and ordinary sense do not include grandnephews

App. Div.]

Third Department, May, 1917.

and grandnieces or more remote descendants unless there is something in the will to show that the words were used in a broader sense. (*Pimel v. Betjemann*, 183 N. Y. 194; *Matter of Woodward*, 117 id. 522; *Low v. Harmony*, 72 id. 408.)

There are many authorities on wills in which the word "children" and the words "nephews and nieces" have been construed to mean "grandchildren," and "grandnephews and grandnieces," but in all of these cases it was either from necessity, where the will would otherwise remain inoperative or where the testator had clearly shown, by the use of other words, that he did not intend to give the words used their primary and ordinary meaning but used them in some other or secondary sense.

In this case, however, there is no necessity or room for a judicial construction of the 11th, 12th or 13th clauses of the will, which in express terms give the principal of the two trust funds and the residuary estate to the nephews and nieces of the testatrix. The language used by the testatrix in each of these provisions of her will is not of a doubtful or uncertain effect, and there is nothing in any of them that tends to show that she did not use the words "nephews and nieces" in their ordinary and primary sense. Under such circumstances the rule is that the other parts of the will cannot be resorted to to determine the meaning of these provisions. (*Eidt v. Eidt*, 203 N. Y. 325.)

Neither is there any ambiguity in any of the previous clauses of the will. Each is clear and definite in itself and describes the subject and the object of the gift with absolute certainty. In none of these clauses does the language employed indicate a disposition in the testatrix to give the respondents more than the amount specified in the 3d clause.

A study of the entire will does not disclose any conflict between the intention of the testatrix as expressed in one claim or provision and her intention as expressed in another. There is nothing in it that tends to show that the terms "nephews" and "nieces" were not used in their ordinary sense and meaning. The fact that each of the respondents was given only thirty-four dollars less than the bequest to each of the nephews and nieces, except one, is entitled to no more consideration in construing the will than the fact that the

same amount was given to the Sunday school and to Sarah G. Bradley as was given to each of the nephews and nieces. By the same rule a gift to these legatees would be taken as an intention to include them in the distribution of the residuary estate as well as the respondents. A clear and unmistakable intention of the testatrix not to include her grandnephews and nieces, as beneficiaries under the 11th, 12th or 13th clauses of the will, is apparent from the fact that in the 13th clause she drew a clear distinction between her nephews and nieces and the descendants of nephews and nieces. We think this brings the case within *Matter of Woodward*, where it was expressly held that a legacy to nephews and nieces did not include the descendants of nephews and nieces. In that case some of the legatees were described as "nephews and nieces," and others as "children of my deceased niece," and the court said that the discrimination in the language and the choice of words of description "indicate no intention to include the persons named with nephews and nieces, but the contrary. It is obvious the testator had in his mind the different degrees of relationship of his various beneficiaries, and the selection of different words to describe them cannot be attributed to mistake or inadvertence. To hold otherwise would not preserve his intent, but defeat it. The authorities are also the same way."

The language of the 11th and 12th clauses also manifests an intention not to include the descendants of a nephew or niece. If she had intended to give them an equal share in the \$5,000, upon the death of her brothers, she certainly would have used some words indicative of such an intention and not have restricted the division of it to "my nephews and nieces who shall then be living."

The construction contended for by the respondents is based entirely upon the assumption that the court has power to read into the 11th, 12th and 13th clauses the names of the respondents to effectuate an intention which is neither expressed nor necessary to be implied. It has been repeatedly held that to support a gift by implication the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to present no other reasonable inference. (*Leggett v. Stevens*, 185 N. Y. 70; *Brown v. Quintard*, 177 id.

App. Div.]

Third Department, May, 1917.

75; *Bradhurst v. Field*, 135 id. 564; *Post v. Hover*, 33 id. 593.)

In the case of *Leggett v. Stevens* (*supra*) there was a will in which there was a disposition of a certain fund to the testator's wife and an attempt to dispose of what was left of the fund after her death. The direction was that it "shall be equally divided between my adopted daughter, Helen S. Eldridge, * * * if she is living, if she has children to go to them, if not to go to my nearest a kin on my side." The testator left a son as well as the adopted daughter. From other parts of the will it was evident that the testator intended that, upon his wife's death, this fund should be divided between this son and the adopted daughter. But the son was not mentioned in the clause disposing of the particular fund, and the court held that, although the testator's intention might be gleaned from some other portion of the will, it could not import into it the name of the son for the purpose of effectuating the testator's probable intention.

It follows that, whether we take the plain language of the 11th, 12th or 13th clauses or search for the intention of the testatrix in the context of the will, it cannot be implied that she intended that the respondents, the children of her "deceased nephew," should share in the distribution of the trust funds or the residuary estate.

The decree of the Surrogate's Court should, therefore, be reversed, with costs against the respondents, and the proceedings remitted to that court to be there disposed of in accordance with the views here expressed.

All concurred.

Decree reversed, with costs against the respondents, and proceeding remitted to the surrogate for his action.

WILLIAM BILLS, Respondent, v. WILLIAM J. BAKER, Appellant.

Third Department, May 10, 1917.

Replevin — when defendant in possession of property cannot justify under title of stranger — Code of Civil Procedure, section 1723, as to answer of title not applicable to actions before justice of the peace — evidence insufficient to connect defendant with alleged right of prior plaintiff in property.

In an action of trespass, trover or replevin, a defendant cannot justify under the title of a stranger without connecting himself with the right of said person. The reason is that possession is *prima facie* evidence of right and conclusive against all the world except the true owner or one connecting his title with him.

This rule was not changed by section 1723 of the Code of Civil Procedure providing that a defendant may by answer defend on the ground that a third person was entitled to the chattel without connecting himself with the latter's title.

Said section is not applicable to actions to recover a chattel brought before a justice of the peace.

In an action of replevin to recover possession of sheep or the value thereof, it appeared that they were taken by a constable from the possession of the plaintiff in an action brought before a justice of the peace to recover the same, in which the plaintiff herein was defendant; that they were delivered by the constable to the defendant herein who has since kept and refused to deliver them to the plaintiff; that at the opening of the trial in the prior action, the requisition was set aside for a defect in the undertaking, and the attorney for the defendant then said that they would try the suit as if there had been no replevin and that the sheep would be left where they were until after the decision, but said proposition was not accepted by the plaintiff. The justice heard and determined the action in favor of the plaintiff therein, and the only allegation in the answer tending to connect the defendant with the alleged title of the plaintiff in the prior action was that the sheep are the property of said defendant.

Evidence examined, and *held*, insufficient to connect the defendant with any right the plaintiff in the prior action may have had in the property; that the defendant was a mere bailee of the constable who was a wrongdoer and had no right to the possession of the property as against the plaintiff.

APPEAL by the defendant, William J. Baker, from a judgment of the County Court of Warren county, entered in the office of the clerk of said county on the 18th day of September,

App. Div.]

Third Department, May, 1917.

1916, upon the decision of the court after a trial before the court without a jury.

The action was brought to recover possession of fifteen sheep or the value thereof, together with damages for the alleged wrongful detention of the same by the defendant.

The evidence shows that on the 16th day of December, 1915, the sheep were taken by a constable from the possession of the plaintiff in an action brought before a justice of the peace to recover the same; that Nathaniel Middleton was plaintiff in that action and the plaintiff herein was defendant, and that the sheep were on the same day delivered by the constable to the defendant who has since kept them in his possession and refused to deliver them to the plaintiff.

It also appeared that at the opening of the trial in the replevin action the requisition was set aside for a defect in the undertaking; that the justice thereafter proceeded to hear and determine the action, and that his docket shows the following entry:

" Sheep awarded to Middleton; in case they cannot be delivered, then the judgment, damages and costs. Testimony being closed, I herewith on this 20th day of December, 1915, render judgment in favor of Nathaniel Middleton, the plaintiff, against William Bills, the defendant, for the sum of \$55 and no cents damages, and the sum of \$5.40 costs, amounting in all to \$60.40.

" Dated, December 20, 1915,

" THOMAS W. SMITH,

" *Justice of the Peace.*"

Eight days after this judgment was awarded the defendant paid to the justice the sum of \$60.40 and the justice signed and gave him a receipt which stated that it was "in full for judgment and costs in the replevin action of Nathaniel Middleton vs. William Bills. \$55.00 of said amount representing the said judgment for damages and \$5.40 the costs."

The answer alleges that the sheep are the property of Middleton and that the defendant is keeping them for him. There is no other allegation tending to connect the defendant with Middleton's alleged title.

Fred A. Bratt, for the appellant.

Daniel J. Finn [*Frank Hurley* with him on the brief], for the respondent.

SEWELL, J.:

It has been decided in many cases that in an action of trespass, trover or replevin a defendant cannot justify under the title of a stranger, without connecting himself with the right of said person. The reason is that possession is *prima facie* evidence of right, and conclusive against all the world, except the true owner, or one connecting his title with him. (*Duncan v. Spear*, 11 Wend. 54; *Rogers v. Arnold*, 12 id. 30; *Brown v. Bowe*, 35 Hun, 488; *Stowell v. Otis*, 71 N. Y. 36; *Stonebridge v. Perkins*, 141 id. 1.)

This rule was not changed by section 1723 of the Code of Civil Procedure. That section is not applicable to actions to recover a chattel brought before a justice of the peace.

The proof in the present case did not warrant the court in finding that the defendant had any connection with or relation to the alleged title, possession or interest of Middleton or that he was acting under his orders. It is true that the evidence shows that after the requisition in the action for replevin had been dismissed, the attorney for the defendant therein said: "We will go on and try the suit as if there had been no replevin; the sheep will be left where they are until after the suit is decided; then if it is decided they are Bills' he can take them; if they are Middleton's they will remain where they are or he can do what he pleases with them." But this evidence, viewed in the light most favorable to the defendant, comes far short of being sufficient to connect the defendant with any right Middleton may have had in the property. It does not appear that the proposition was satisfactory to or was accepted by the plaintiff in that action, or that the trial proceeded or any other thing was done in consequence of it. It does not appear that the plaintiff herein was present when the proposition was made or ever had knowledge of it, and it must be conceded that the attorney, as such, could not stipulate away or affect the right of the plaintiff in respect to the possession of the sheep or in any other

App. Div.]

Third Department, May, 1917.

matter outside of the conduct of that action. So far as appears the defendant was a mere bailee of the constable, who was a wrongdoer and had no right to the possession of the property as against the plaintiff.

The views expressed in regard to the case render it unnecessary to consider the exception taken by the defendant on the trial to the admission or rejection of evidence. The judgment is right and should be affirmed, with costs.

All concurred; KELLOGG, P. J., in result.

Judgment affirmed, with costs.

THE HAGEDORN-MERZ Co., a Corporation, Appellant, v.
JOHN J. BURNS, Respondent.

Third Department, May 10, 1917.

Pleading — remedy for frivolous pleading — motion to strike out answer or part thereof as frivolous, unauthorized — appeal — order denying motion to strike out denial in answer as frivolous not appealable.

The Code of Civil Procedure does not authorize the striking out of an answer or any part thereof on the ground that it is frivolous.

The remedy for a frivolous pleading is a motion for judgment thereon under section 537 of the Code of Civil Procedure. But the relief afforded by this section can only be granted where the whole answer is frivolous, where there is no affirmative defense, the theory being that there is, in effect, no answer at all and, therefore, the plaintiff should have judgment as for a failure to answer.

On granting a motion for judgment on the ground of the frivolousness of the pleading, the pleading adjudged to be frivolous is not stricken out but remains upon the record and becomes a part of the judgment roll.

A plaintiff is not entitled to appeal from so much of an order denying his motion for judgment on an answer as frivolous as denies his motion to strike out a denial as frivolous, as he is not "a party aggrieved" within the meaning of section 1294 of the Code of Civil Procedure. He will be deemed to have appealed from the whole order.

KELLOGG, P. J., dissented, with opinion.

APPEAL by the plaintiff, The Hagedorn-Merz Co., from an order of the Supreme Court, made at the Ulster Special Term

and entered in the office of the clerk of the county of Sullivan on the 29th day of May, 1916, denying plaintiff's motion for an order striking out the portion of the answer herein which denies "each and every other allegation contained in said complaint, except as hereinafter admitted, qualified or explained" as frivolous and for judgment on the pleadings.

John D. Lyons, for the appellant.

Arthur C. Kyle, for the respondent.

SEWELL, J.:

The notice of appeal states that the appeal is from an order granted herein at a Special Term of the Supreme Court, "entered in the Sullivan county clerk's office on May 29, 1916, denying plaintiff's motion that that portion of the answer herein which 'denies each and every other allegation contained in said complaint except as hereinafter admitted, qualified or explained' be stricken out as frivolous."

In reviewing the order appealed from it is not necessary to express an opinion with respect to the form of the denial, for, assuming that it does not controvert any allegation of the complaint, and is, therefore, frivolous it should not be stricken out on that account.

The Code of Civil Procedure does not authorize the striking out of an answer or any part of an answer on the ground that it is frivolous. (*Briggs v. Bergen*, 23 N. Y. 162; *Fettretch v. McKay*, 47 id. 426.)

The remedy for a frivolous pleading is a motion for judgment thereon under section 537 of the Code of Civil Procedure. (*Rochkind v. Perlman*, 123 App. Div. 808; *Strong v. Sproul*, 53 N. Y. 497.) The relief afforded by this section can, however, only be granted where the whole answer is frivolous, where there is no affirmative defense, the theory being that there is in effect no answer at all, and, therefore, the plaintiff should have judgment as for a failure to answer. (*Soper v. St. Regis Paper Co.*, 76 App. Div. 409; *Reese v. Walworth*, 61 id. 64; *Barton v. Griffin*, 36 id. 572.)

In this case the answer also sets up sufficient facts to entitle the defendant to prove the alleged breach of warranty. He

App. Div.]

Third Department, May, 1917.

is entitled to a trial, and to have the facts determined upon evidence in the usual manner. The plaintiff seems to concede that he was not entitled to judgment upon the pleadings, but contends that the appeal is only from that part of the order that denied the motion to strike out the denial and that this refusal affected a substantial right.

I think that the whole order is before us upon this appeal. The notice of appeal is not from so much of the order as denies the motion to strike out the denial. It is not from a specified part, but from the order, entered as stated therein, which denied the motion for judgment on the answer as frivolous. That was the only determination that could be made. The application to strike out was not a material or proper part of the motion. On granting a motion for judgment, on the ground of the frivolousness of a pleading, the pleading adjudged to be frivolous is not stricken out, but remains upon the record and becomes a part of the judgment roll. A judgment granted on the motion of frivolousness of a pleading is rendered on the pleading and not without it, and the pleading remains in the case. (*Briggs v. Bergen*, 23 N. Y. 162.)

If this appeal is not from the whole order; if the order should be regarded as separated, and the appeal only from the part "denying plaintiff's motion that that portion of the answer herein which 'denies each and every other allegation contained in said complaint, except as hereinafter admitted, qualified or explained,'" it should be dismissed. It is only "a party aggrieved" by an order of the Special Term who may appeal therefrom. (Code Civ. Proc. § 1294.) The plaintiff was not aggrieved by this part of the order, because, as before observed, the Code does not authorize the striking out of a denial as frivolous.

The order appealed from should, therefore, be affirmed, with ten dollars costs and disbursements.

All concurred, except KELLOGG, P. J., who favored modification and affirmance as per opinion.

KELLOGG, P. J. (dissenting):

The complaint is for shirt waists sold and delivered between the 25th day of May and the 11th day of September, 1915,

both inclusive, of the value and agreed price of \$238.75. The first answer admits the corporate capacity of the plaintiff and the business and residence of the defendant. The second answer denies "each and every other allegation contained in said complaint, except as hereinafter admitted, qualified or explained." The third answer alleges that prior to the eleventh day of September defendant ordered of the plaintiff certain goods, wares and merchandise, consisting of a quantity of ladies' shirt waists, and then sets up warranties or representations and a breach thereof. The second answer is manifestly neither a general nor a specific denial of any allegation of the complaint, and is bad pleading. (*Barton v. Griffin*, 36 App. Div. 572.)

We need not consider whether the real remedy of the plaintiff was to move to strike out this answer as frivolous under section 537 of the Code of Civil Procedure, or a motion to make it more definite and certain under section 546. If the allegation was indefinite and uncertain, and the indefiniteness was prejudicial to the plaintiff, or might be prejudicial to the plaintiff, he was entitled to some remedy. It is true that section 537, in the case of a frivolous pleading, contemplates a motion for judgment; but in the *Barton* case this court sustained an order striking out such an answer as frivolous.

The plaintiff may urge that it is not entirely clear from the answer what is admitted. If it is not evident that this answer can do him no harm, he is entitled to relief, as a defendant, by an improper pleading, cannot prejudice the plaintiff or put his rights in jeopardy. We have seen that the complaint alleges that during five months shirt waists of the value and agreed price of \$238.75 were sold by the plaintiff to the defendant. There is nothing in the answer admitting this allegation except the bare statement that prior to September the defendant did buy of the plaintiff certain goods, wares and merchandise, consisting of a quantity of ladies' shirt waists. This allegation is not as broad as the allegation of the complaint. It says certain "shirt waists"—not \$238.75 worth. The plaintiff is not obliged to guess what the decision of the court would be when defendant contends that that statement in the answer is not an admission of all of the sales

App. Div.]

Third Department, May, 1917.

claimed. Technically, if two shirt waists were bought on a *quantum meruit*, the allegation of the answer would be justified. It cannot be told from the answer and the complaint how many of the waists were bought or what the value and agreed price was. Therefore, the denial is prejudicial to the plaintiff. The motion papers ask to have this answer stricken out "and for such other and further relief, or both, in the premises as may be just." I favor a modification of the order so as to allow the defendant to amend that part of the answer within ten days, and if he does not amend it that it be stricken from the pleading, and as so modified the order should be affirmed, with costs.

Order affirmed, with ten dollars costs and disbursements.

KATZ UNDERWEAR COMPANY, Appellant, v. JOHN J. BURNS,
Respondent.

Third Department, May 10, 1917.

Pleading — goods sold and delivered — answer — allegations insufficient to constitute counterclaim or valid defense.

Where a defendant sued for goods sold and delivered alleges as a defense that the goods ordered were represented by the plaintiff to be first class in every respect and extra good value for the price quoted, when as a matter of fact they were not first class or extra good value, but were inferior and of less value than the price charged, the plaintiff is entitled to judgment on the pleadings under section 547 of the Code of Civil Procedure. This because the denial does not put in issue any material allegations of the complaint and does not constitute an offset or counterclaim, not being pleaded as such.

KELLOGG, P. J., dissented in part, with opinion.

APPEAL by the plaintiff, Katz Underwear Company, from an order of the Supreme Court, made at the Ulster Special Term and entered in the office of the clerk of the county of Sullivan on the 29th day of May, 1916, denying a motion to strike out paragraph "second" of the answer as frivolous and for judgment on the pleadings.

John D. Lyons, for the appellant.

Arthur C. Kyle, for the respondent.

SEWELL, J.:

The complaint in this action is for goods sold and delivered to the defendant. The answer starts out with an admission that the plaintiff is a corporation and the defendant a resident of Sullivan county, State of New York. Following this is a denial of "each and every other allegation contained in said complaint, except as hereinafter admitted, qualified or explained."

The defendant then alleges as follows: "Further answering said complaint and as a defense thereto, the defendant alleges that prior to the 24th day of August, 1915, he ordered from the above-named plaintiff certain goods, wares and merchandise consisting of a quantity of ladies' shirt waists. That the goods were represented by the said plaintiff to be first class in every respect and to be extra good value for the prices quoted. * * * That as a matter of fact, they were not first class goods, were not extra good value at the prices quoted, and were of inferior quality and make, and were not of the value or class of goods ordered by this defendant. That the value of the goods not paid for was much less than the price charged for the same. Wherefore, defendant demands judgment that the complaint herein be dismissed with costs."

It is apparent that the denial does not put in issue any material allegations of the complaint. It is equally apparent that the answer does not contain, as found by the Trial Term, "an offset * * * well pleaded," but only matters alleged as a defense. It is well settled that where a defendant insists upon a counterclaim it must be pleaded as such, and unless that is done it can be resorted to and used only as a defense. (*Pratt & Whitney Co. v. Pneumatic Tool Co.*, 50 App. Div. 369; *Bates v. Rosekrans*, 37 N. Y. 409; *DeGraaf v. Wyckoff*, 118 id. 1.)

I think, therefore, that the plaintiff was entitled to judgment under section 547 of the Code of Civil Procedure. That section provides that "If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly."

App. Div.]

Third Department, May, 1917.

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion for judgment granted, with ten dollars costs.

All concurred, except KELLOGG, P. J., who favored modification and affirmance as per opinion.

KELLOGG, P. J. (dissenting):

The complaint is for shirt waists sold and delivered between the 25th day of May and the 11th day of September, 1915, both inclusive, of the value and agreed price of \$238.75. The first answer admits the corporate capacity of the plaintiff and the business and residence of the defendant. The second answer denies "each and every other allegation contained in said complaint, except as hereinafter admitted, qualified or explained." The third answer alleges that prior to the eleventh day of September defendant ordered of the plaintiff certain goods, wares and merchandise, consisting of a quantity of ladies' shirt waists, and then sets up warranties or representations and a breach thereof. The second answer is manifestly neither a general nor a specific denial of any allegation of the complaint, and is bad pleading. (*Barton v. Griffin*, 36 App. Div. 572.)

We need not consider whether the real remedy of the plaintiff was to move to strike out this answer as frivolous under section 537 of the Code of Civil Procedure, or a motion to make it more definite and certain under section 546. If the allegation was indefinite and uncertain, and the indefiniteness was prejudicial to the plaintiff, or might be prejudicial to the plaintiff, he was entitled to some remedy. It is true that section 537, in the case of a frivolous pleading, contemplates a motion for judgment; but in the *Barton* case this court sustained an order striking out such an answer as frivolous.

The plaintiff may urge that it is not entirely clear from the answer what is admitted. If it is not evident that this answer can do him no harm, he is entitled to relief, as a defendant, by an improper pleading, cannot prejudice the plaintiff or put his rights in jeopardy. We have seen that the complaint alleges that during five months shirt waists of the value and agreed price of \$238.75 were sold by the plaintiff to the defendant. There is nothing in the answer admitting this

allegation except the bare statement that prior to September the defendant did buy of the plaintiff certain goods, wares and merchandise, consisting of a quantity of ladies' shirt waists. This allegation is not as broad as the allegation of the complaint. It says certain "shirt waists"—not \$238.75 worth. The plaintiff is not obliged to guess what the decision of the court would be when defendant contends that that statement in the answer is not an admission of all of the sales claimed. Technically, if two shirt waists were bought on a *quantum meruit*, the allegation of the answer would be justified. It cannot be told from the answer and the complaint how many of the waists were bought or what the value and agreed price was. Therefore, the denial is prejudicial to the plaintiff. The motion papers ask to have this answer stricken out "and for such other and further relief, or both, in the premises as may be just." I favor a modification of the order so as to allow the defendant to amend that part of the answer within ten days, and if he does not amend it that it be stricken from the pleading, and as so modified the order should be affirmed, with costs.

Order reversed, with ten dollars costs and disbursements, and motion for judgment granted, with ten dollars costs.

KATE H. THOMPSON, Respondent, v. POSTAL LIFE INSURANCE COMPANY and THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Appellants.

First Department, June 8, 1917.

Insurance — life insurance — Insurance Law, section 92, construed — sufficiency of notice of forfeiture — reference to right to paid-up policy — limitation of action to enforce agreement for reinstatement of policy after forfeiture.

It was not intended by section 92 of the Insurance Law to require a specification in a notice of forfeiture of a privilege that did not exist in the insurance policy, and, hence, an omission of a reference in the notice to a right to a paid-up policy is immaterial where there was no such right under the policy in question.

The effect of the provision of said section that "No action shall be maintained to recover under a forfeited policy unless the same is instituted

App. Div.]

First Department, June, 1917.

within two years from the day upon which default was made in paying the premium, instalment, interest or portion thereof, for which it is claimed that forfeiture ensued," is that where the policy has in fact been forfeited and it is claimed that the insured has become entitled to have it reinstated by reason of a subsequent agreement or otherwise, the agreement to reinstate it must be made effective by a decree of the court reinstating the policy, or else the action to enforce it on the theory that by the agreement it became reinstated, notwithstanding the forfeiture, must be commenced within the time specified in the statute.

It was competent for the Legislature to prescribe a statutory limitation with respect to the bringing of actions on policies thereafter forfeited.

APPEAL by the defendants, Postal Life Insurance Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of December, 1916, upon the decision of the court after a trial before the court, a jury having been waived.

William J. Bolger, for the appellants.

John Ewen, for the respondent.

LAUGHLIN, J.:

On the 4th day of June, 1896, the Provident Savings Life Assurance Society of New York, one of the defendants, issued a \$5,000 policy on the life of the plaintiff's husband in which she was designated the beneficiary. The other defendant reinsured the risk on the 19th day of January, 1911. The insured died on the 3d day of November, 1914. By the terms of the policy a premium became due on the 4th day of June, 1912, which was not paid, and no subsequent premium was paid on the policy.

The plaintiff alleged in the first count of the complaint that payment of the premium was duly tendered and refused, and that the tender of further premiums was duly waived; and that the provisions of the policy with respect to the time of payment of premiums was modified by mutual agreement, and that it was agreed that failure to pay premiums when due should not terminate the policy. In the second count the plaintiff alleged that payment of the premium due June 4, 1912, was duly tendered and refused and that the tender of payment of further premiums was duly waived; and further alleged that in the month of July, 1912, the defendants made

the claim that the policy had lapsed and become void for the non-payment of the premium due June fourth of that year, and refused to accept payment of said premium, and returned the same; and that thereafter and on the 11th of July, 1912, the Postal Life Insurance Company, defendant, "offered and agreed to reinstate the said policy and to waive any forfeiture on condition that" the insured "should send to it a check for the premium due June 4th, 1912, and should make application for such restoration, and should take an examination before Dr. D. E. Smith, * * * and as the result of such examination, furnish satisfactory evidence of his insurability;" and that the insured sent a check for the premium, and made application for restoration and submitted to examination by said doctor "and as the result of such examination did furnish evidence of his insurability," and that upon such examination it appeared that he "was in good physical health and in insurable condition," but that the defendant thereafter in violation of its agreement refused to accept further premiums and disclaimed any liability on the policy.

Both defendants admitted in their separate answers that they claimed that the policy had lapsed and become void for the non-payment of said premium, and that they refused to accept any proffered payment after the forfeiture and lapse of the policy; but they admitted that they offered and agreed to reinstate the policy and to waive the forfeiture, provided the insured should make application for restoration of the policy and take an examination before a medical examiner to be appointed by them, "and provided further that" the insured "should furnish satisfactory evidence of his insurability," and alleged that he did not furnish such evidence as to his insurability and that they refused to reinstate the policy for that reason. Both defendants pleaded that on the 8th day of May, 1912, which was more than fifteen and less than forty-five days prior to the day when the premium became due, the statutory notice was duly given to the insured; and that the action was not commenced within two years after the default in paying the premium and after the policy had been declared lapsed and forfeited.

It is stated in the opinion of the learned trial court that

App. Div.]

First Department, June, 1917.

the action was sustained solely on the ground that the statutory notice with respect to this premium upon which the forfeiture was predicated was invalid in that it did not comply with the requirements of the statute. By the decision, however, it was further found that certain premiums which fell due prior to June 4, 1912, were accepted after they became due, but that the defendants at no time represented that they would grant extensions of time for the payment of future premiums, and that no agreement for such extension was entered into between the parties. The court decided that the notice was invalid and also that the insured complied with the conditions upon which the companies promised to reinstate him after the alleged forfeiture.

The invalidity of the notice is predicated on the fact that instead of stating, as required by section 92 of the Insurance Law (Consol. Laws, chap. 28; Laws of 1909, chap. 33), that on failure to pay the premium on the due date specified the policy and all payments would become forfeited and void "except as to the right to a surrender value or paid-up policy as in this chapter provided," it stated "except as to the right to a surrender value as provided in the said policy or by statute." The invalidity is claimed owing to the omission of a reference in the notice to a right to a paid-up policy. Under the policy in question there was no right to a paid-up policy in case of failure to pay a premium. It was not intended by the statute to require a specification in the notice of a privilege that did not exist, and that part of the statute is only applicable to policies under which the right to a paid-up policy exists; but it has been recently declared by the Court of Appeals in *McCormack v. Security Mutual Life Insurance Company* (220 N. Y. 447, revg. 161 App. Div. 33) that an omission to mention in such a notice the *privileges* that remain exempt from forfeiture does not invalidate the notice. Therefore the judgment cannot be sustained on the theory on which it was rendered according to the opinion.

In the view I take of the case it is unnecessary to consider the question whether the insured complied with the conditions upon which the defendants agreed to reinstate the policy, for I think the Statute of Limitations of two years, prescribed

in section 92 of the Insurance Law, is a bar to the action. That section prohibits the forfeiture of a policy for non-payment of a premium without the giving of notice as therein prescribed. It then provides as follows: "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, instalment, interest or portion thereof for which it is claimed that forfeiture ensued." It appearing that the statutory notice was duly given and that the premium was not paid there can be no question but that this policy was forfeited. Although the statute was enacted after the policy was issued the forfeiture occurred after the enactment of the statute. There can be no doubt, I think, that it was competent for the Legislature to prescribe a statutory limitation with respect to the bringing of actions on policies thereafter forfeited. Of course if the companies had not been justified in declaring the policy forfeited the statute would not apply, because in that case the action would be upon a policy which had not been forfeited. The learned counsel for the respondent contends on the authority of *Adam v. Manhattan Life Ins. Co.* (204 N. Y. 357) that this Statute of Limitations only applies to policies issued after its enactment; but the only point there decided was that it was not intended to operate upon valid existing policies which had not in fact become forfeited, and in that case the policy under consideration had not been forfeited. It seems to me that the effect of the statute is that where the policy has in fact been forfeited and it is claimed that the insured has become entitled to have it reinstated by reason of a subsequent agreement or otherwise the agreement to reinstate it must be made effective by a decree of the court reinstating the policy or else the action to enforce it on the theory that by the agreement it became reinstated notwithstanding the forfeiture must be commenced within the time specified in the statute. It is, I think, quite clear that such is the purpose of the Legislature, for before the enactment of the statute an action could have been maintained on the policy after the death of the insured, without resorting to equity, on the theory that the company would be estopped by its agreement from claiming the forfeiture.

(*Miesell v. Globe Mut. Life Ins. Co.*, 76 N. Y. 115.) In the case at bar the insured admitted the forfeiture by applying to have his policy reinstated, and while it is claimed that he complied with the conditions upon which the companies agreed to reinstate the policy he refrained from taking any action to have it reinstated by a judicial decree as he might have done. (*Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516.) If the statute does not apply in such case then it is conceivable that forty or fifty years after the forfeiture of a policy for the non-payment of a premium and where no premiums have been thereafter paid a recovery may be had on the policy on the theory of some agreement with respect to a reinstatement thereof. If it was competent, as I think it was, for the Legislature to place a limitation on such actions with respect to the future forfeiture of policies then in force, it is perfectly plain that by this statute it intended so to do.

It follows that the judgment should be reversed, with costs, and the findings and conclusions of law inconsistent with these views reversed, and findings and conclusions in accordance with these views made, dismissing the complaint, with costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Judgment reversed, with costs, and complaint dismissed, with costs. Order to be settled on notice.

LESTER J. SINSHEIMER Doing Business under the Name of
J. SINSHEIMER & SON, Respondent, v. THE UNDERPINNING
AND FOUNDATION COMPANY, Appellant.

First Department, June 8, 1917.

Damages — action at law — basis of damages — consideration of acts after commencement of action — consent of parties — municipal corporations — city of New York — liability of contractor in construction of subway to lessee of land for interference with easements of light, air and access.

Where, in an action at law by a lessee of property abutting upon a street in the city of New York against a contractor with the city engaged in the construction of the subway, to recover damages for the interference with.

the plaintiff's easements of light, air and access, caused by certain structures erected by the defendant, the parties consent to the determination of the defendant's liability for the presence of the structure, which had been transferred to another for a period after the commencement of the action, and such issue is presented to the jury without objection, the defendant is not in a position to attack the recovery upon appeal, although, as a general rule, anything happening after the commencement of an action at law cannot be used as the basis of damages.

A lessee of land abutting on a business street in the city of New York has an easement in the highway for light, air and access by reason of the situation of his property, which cannot be taken from him without just compensation, and the city in constructing the subway through its contractor discharges a proprietary and not a governmental function rendering it liable for any interference with the easements of light, air and access, although the work is done without negligence, in the most approved manner, and for the furtherance of a great public convenience.

APPEAL by the defendant, The Underpinning and Foundation Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of May, 1916, upon the verdict of a jury for \$5,500, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Herman Aaron, for the appellant.

Nathan L. Miller [*Louis J. Vorhaus* with him on the brief], for the respondent.

DOWLING, J.:

This action is brought to recover from the defendant, which was engaged in the erection of a section of the subway on Broadway, damages claimed to have been sustained by reason of the erection, maintenance and operation by defendant on the street and sidewalk in front of plaintiff's demised premises of certain structures used in the work of excavation and construction, and from which said work was prosecuted for a considerable distance north and south of the said premises thereby interfering with plaintiff's easement of light, air and access, and imposing an undue and excessive burden upon his premises as against other premises along the section of the subway served by such structure. The answer is a general

denial and a defense that the structures complained of were authorized by the Public Service Commission and were merely temporary and incidental to a work of public necessity performed without negligence in the construction of a portion of the rapid transit railroad, pursuant to a contract between the defendant and the city of New York.

There is but little dispute as to the facts. Plaintiff was the lessee of the store, basement and sub-basement of the premises No. 593 Broadway and No. 186 Mercer street thirty feet in width by two hundred feet in depth. Of these premises he had been the occupant since February 1, 1907, and at the time in question he was in possession under a lease for five years from February 1, 1911, at a yearly rental of \$7,500, conducting therein a wholesale business as a dealer in hosiery and knit goods. Of the Broadway front the northerly five feet were used for an entrance to the upper part of the building, and of the remaining twenty-five feet, about fifteen feet were occupied by a show window, beginning about two feet from the level of the sidewalk and extending to the ceiling of the store, which was about eighteen feet in height. The entrance to plaintiff's store was at the southerly end of the building. Adjoining it and at right angles to the main show window was another window extending to the same height; the entrance door was of glass above a three-foot wooden panel. Broadway is eighty feet wide at this point. Before the operations in question, the light entering plaintiff's premises was sufficient to enable business to be done therein during the spring and summer months until four o'clock in the afternoon, without artificial light, to a distance of about one hundred and twenty-five feet from Broadway. Defendant was the contractor with the Public Service Commission for the construction of a section of the Lexington Avenue Rapid Transit railroad on Broadway, from a point near Howard street to about the middle of the block between Prince and Bleecker streets, a total length of two thousand six hundred and eleven feet. The method of construction adopted for the work was the most approved one, known as the "cut and covered" method, by which the annoyance to abutting property owners was minimized and the obstructions to street

and sidewalk travel made as little as possible. Under this method a portion of the street surface is removed at night and planks installed in place thereof so that by daylight the street is in condition for uninterrupted travel thereupon. It is a more expensive method than the one formerly adopted, known as the "open cut" method, under which the entire street was excavated and left open, with the exception of car traffic, and the sidewalks interfered with as well. There is no question that the best and most approved (as well as the most expensive) method of construction was adopted, in order to make the discomfort and loss as little as possible during the progress of the work. The Public Service Commission determined that it was necessary that shafts should be sunk and operated for the removal of the excavated material and for the prosecution of the work underground; and the defendant finally erected two double shafts, one of which was located in front of plaintiff's premises. In March, 1912, the defendant erected in front of the premises in question the structure which is the cause of this suit. It consisted of a bridge composed of heavy, steel girders supported at both ends by wooden struts (twelve-inch by twelve-inch timbers) inclosing a shaft and supporting bins for the excavated materials. This bridge was floored over and on the bridge were two stiff-legged derricks, each serving a shaft on opposite sides of the street. There were bins on each side of the bridge to contain excavated material and housing for the hoisting machines, two in number, each of which served a derrick. The substructure of the bins was boarded up for its full height to the underside of a fire escape in front of the store and there was a platform extending out from the bins towards the fire escape, this platform being erected to accommodate the derrick signalman. The plans and photographs show the substantial character of this structure. On the westerly side of Broadway in front of the store in question, and on the northerly part thereof, was the shaft, the outside dimensions of which were about nine feet six inches in width and fourteen feet three inches in length. Then came to the south the substructure of the bins fifteen feet four inches in length by six feet nine inches in width. It was this latter structure which was boarded up to above the first floor, level, the

northerly structure being boarded up to a man's height. Thus out of the thirty-foot frontage of plaintiff's demised premises the southerly twenty-five feet embracing the entrance and show window were completely covered by the structures erected by defendant, the five feet not so covered being the northerly part, in which was the entrance to the upper part of the building. The sidewalk in front of plaintiff's premises was seventeen feet wide. Plaintiff introduced evidence to the effect that some twelve feet of this were taken up by the substructure, leaving a passageway between five and six feet wide, while defendant contends that the width of the passageway left was seven and one-half feet. The superstructure overhanging the substructure, as has been said, extended as far as the fire escape, thus making a completely covered passageway in front of the plaintiff's store. The entire operation of the excavation and removal of material and of construction, was carried on from these two shafts; the one in question being a little north of the center of the work on the north end, and there being another a little south of the center of the work on the south end, below Grand street. There is testimony that the effect of this construction was to darken plaintiff's store so that he had to keep it lit by artificial light all day, the defendant itself furnishing a lamp for use in the vestibule, from about half past four or five o'clock in the winter time. The light was insufficient to properly show goods to customers within the store and they had to be taken to the front thereof or to the windows on the Mercer street side, and sometimes even into the vestibule to enable the color and texture of the goods to be discerned. The accessibility of the store was affected and its visibility so obscured that the plaintiff's business sign could not be observed either from the other side of the street or from the north or south, nor in fact anywhere save from within the passageway. The passageway itself became so crowded at times with people watching the operations in the shaft that a sign was erected at the suggestion of the Public Service Commission: "Danger. Keep moving." This condition remained practically unchanged from March, 1912, until December, 1913, at which time the defendant's work under its contract was completed; but instead of removing the

structures in question the defendant entered into a contract with the Dock Contractor Company on October 7, 1913, by which for the sum of \$15,000 it gave that company the right to use the structures for its work in constructing the section to the north, despite the protests of the plaintiff. The Dock Contractor Company conducted its operations from this structure and it was not removed until December, 1914. Plaintiff's recovery herein is solely for the interference with the plaintiff's easement of light, air and access, no damage being claimed by plaintiff, nor allowed by the court, on account of noise or anything in the nature of a nuisance. The diminution of rental value by reason of the structure was testified to by two experts, one of whom gave the amount of loss as \$4,000 a year and the other as \$5,148.80.

The first point raised by the appellant which requires consideration is that error was committed in allowing a recovery herein which embraces damages for the period during which the Dock Contractor Company was in possession of the structure in question. This action was commenced May 18, 1913. Plaintiff has recovered the damages caused to him by the maintenance and operation of the structure complained of during the entire time of its continuance and until its removal, which included the occupancy by the Dock Contractor Company. The action being one at law, anything happening after its commencement could not be used as the basis of damages. (*Pond v. Metropolitan Elevated R. Co.*, 112 N. Y. 186; *Ottenot v. New York, L. & W. R. Co.*, 119 id. 603; *Tallman v. Metropolitan Elevated R. R. Co.*, 121 id. 119; *Amerman v. Deane*, 132 id. 361.) But parties have a right to try their controversies in their own way in the absence of objection, and it is quite obvious that the plaintiff and defendant were equally willing that the issue of defendant's liability, if any, should not alone be determined, but that they were both agreed that if defendant was liable the entire amount of plaintiff's damage should be determined in this action and that he should recover therein not only the damage which he sustained down to the time of the commencement of his suit, but also his entire damage down to the removal of the structure by the Dock Contractor Company. An examination of the record satisfies us that this is

the case, and it is further confirmed by the fact that all the evidence as to the occupancy and use of the structure by the dock company after defendant had completed its contract was received in evidence without any objection upon the part of the defendant. Furthermore the court in his charge to the jury said: "The defendant is responsible for the time during which this entire structure remained in front of the premises of the plaintiff, if the plaintiff is entitled to any damages, for the reason that the fact that the defendant gave the right to some other concern, which did not even have the excuse that might morally have been presented, we will say, by the defendant to use this structure. This makes the defendant liable for the entire time that the structure was there. So that the damages must be measured by the entire period of time, commencing from the time that it was put up until the time that it was removed. I do not remember the exact period. It was something like three years; is that right? Mr. Cochrane [defendant's trial counsel]: Two years and ten months. The Court: Two years and ten months." To this part of the charge there was no exception. Later on the jury was recalled for further instructions, in the course of which one of the jurors asked: "Your Honor, will you repeat your part of the charge of having to take the loss for three years, that is, not splitting it up, for instance, with the Dock Company. The Court: You have a right to give damages for the entire time that the structure remained in place, which is about three years, or a little less than three years. Mr. Cochrane: I will have to except to your Honor's charge in that form. The Court: In that way; what is the objection to it? Mr. Cochrane: They must first find that there was a damage through its invasion, through these elements. The Court: I know; there is no question about that. He is asking me as to the length of time merely. The Ninth Juror: Must it be for the entire time, or not at all? The Court: Yes. I tell you, if you give damages, you must give it for the entire time. The Twelfth Juror: It must be for the three years? The Court: Whatever it is. The First Juror: Two years and ten months. The Court: Two years and nine or ten months; I will not say it is just three years, but whatever time it was there, that is all I say. You

cannot give it for one month or two months. If you give damages, you must give them for the entire time the structure was there. That is the law of the case." To these instructions no exception was taken. We find no error, therefore, in the submission to the jury under the rule just laid down by the court, without exception, for the determination of the issue which the parties were willing the jury should decide. The defendant's acquiescence in that ruling and in such decision prevents its now attacking the recovery upon appeal. (*Caponigri v. Altieri*, 165 N. Y. 255; *Lahr v. Metropolitan Elevated R. Co.*, 104 id. 268.)

The remaining question in the case is whether upon the facts proven there was any liability whatever upon the part of the defendant for the construction and operation of the shaft and structures in question, or whether it is a case where private rights must yield to temporary inconvenience and loss arising from acts done in the public interest performed under legislative authority; in which case, in the absence of negligence, the persons performing the work under such authority in good faith are not liable for consequential damages. In other words it is claimed to be a case of *damnum absque injuria*. The respondent relies largely upon the cases of *Bates v. Holbrook* (171 N. Y. 460) and *Matter of Rapid Transit Railroad Commissioners* (197 id. 81). It is quite true that in the former case the court said (p. 469): "Damages which are inflicted upon abutting property owners in the performance of public work, reasonably and properly conducted, are regarded as *damnum absque injuria*. This exemption rests upon the necessity of the situation and commends itself to all reasonable minds. The necessary injuries and annoyances inflicted upon this plaintiff, in the proper prosecution of this work, arise from the opening of the street in Fourth avenue, on the east side of his property, and the construction of the subway, by blasting, and other necessary work, involving obstruction, noise and general inconvenience. When this portion of the work is accomplished and the street restored to its normal condition opposite his property, the annoying situation would cease as to him. If, however, the structures, of which complaint is made, are to be maintained during the entire prosecution of the work on defendant's section, the

plaintiff is subjected to annoyances and injuries that are neither necessary nor reasonable." But that case was decided upon its own peculiar facts and presented a situation which rendered it somewhat unique so that the court felt called upon to say (p. 471): "We wish to be understood as deciding this case upon its peculiar facts and not laying down any general rule as to the conduct of this subway work. It is impossible to so precisely regulate the damages as to prevent greater loss to one abutting owner than another under apparently like circumstances. What we do hold is that these defendants ought not to be permitted to continue a condition of affairs that is rapidly reducing this plaintiff to bankruptcy when the trial court has found in substance that the structures of which complaint is made, are not necessary for the reasonable prosecution of the work." In that case the burden of bearing the loss and damage entailed by the maintenance of the buildings opposite plaintiff's hotel, which constituted a nuisance, were cast solely upon him while that loss could have been lessened to the plaintiff if the plant had been placed in a less frequented section, or if smaller plants had been distributed along the line of the work. Furthermore, the buildings complained of had been erected in a public park without any warrant of law and were permanent, in the sense that they were devoted to the prosecution of the entire work of the defendant's construction, and not merely of a subdivision thereof. The case was called by the court one of peculiar hardship and every warning was given that it was decided solely upon its peculiar facts and was not to be taken as a general guide. Even in that case, however, Judge O'BRIEN dissenting (with him Chief Judge PARKER) deemed it governed by the rule enunciated by Judge MARTIN in *Fries v. New York & Harlem R. R. Co.* (169 N. Y. 282): "In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact." So that the *Bates Case* (*supra*) is not controlling in the case at bar. I can find no way, however, of distinguishing this case in principle from the *Joralemon Street* case (*Matter of Rapid Transit*

Railroad Commissioners, 197 N. Y. 81). There the Court of Appeals held (p. 97): "The use made of the street by the city in constructing the subway and operating, or causing to be operated, a railroad therein, is not a street use as that term is known in the law." The court also said (p. 96): "The city owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted, to build and operate the road. * * * In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign. * * * The construction of the subway comes within none of the apparent exceptions to the command of the Constitution that private property shall not be taken for public use without just compensation." And at page 102: "It is well established that a railroad corporation cannot interfere with the easements of light, air and access without liability." And further (p. 105): "The city in prosecuting the work or causing it to be prosecuted through contractors, was not improving a highway, but building a railroad out of which it could make money, and its liability is that of an ordinary railroad corporation doing the same work in the same way. It can lawfully claim no immunity from liability, except such as would belong to a railroad company, engaged in a similar enterprise, under like circumstances. Although it was conducting a public work, it was such only and to the same extent as the building of a railroad by a private corporation is a public work. While the work was for the benefit of the public, it was not for the benefit of the highway, nor for a street purpose, but for a proprietary purpose. * * * Any agency, even when properly used in the street, not for the improvement thereof but to promote a business enterprise of the city, which inflicts physical injuries upon the property of abutting owners, imposes a liability that should be met by the city. * * * There is no reason why all lawful damages caused by the proper conduct of the work contemplated by the statute, whether inflicted by the city directly in doing the work itself, or indirectly by contracting with some one to do it, should

not be included in the award." The same case also holds that it is not necessary that the abutting owner should own the fee in the street to be entitled to recover damages (p. 103). "The real ground on which an abutter is entitled to damages for the physical impairment of his property in a case like this is not that he owns the fee of the street, but owns land abutting on the street. The fee is of slight value and of no value whatever, except to support a theory leading to injustice, for the proximity of his land to the street is what gives value to the abutter's property. 'By virtue of proximity,' said Judge ANDREWS in one case, and 'by reason of its situation,' said Judge PECKHAM in another, does the abutter have easements and rights in the street which are properly entitled to the protection of the law." (*Kane v. N. Y. Elev. R. R. Co.*, 125 N. Y. 164, 180; *Bohm v. Met. Elev. R. Co.*, 129 id. 576, 587.) (See, also, *Donahue v. Keystone Gas Co.*, 181 N. Y. 313.) That the owner of land abutting on the street has an easement in the highway for light, air and access and such easement constitutes property which cannot be taken from its owner without just compensation has been decided in *Story v. New York Elevated R. R. Co.* (90 N. Y. 122); *Lahr v. Metropolitan Elevated R. Co.* (104 id. 268), and *Muhlker v. Harlem Railroad Co.* (197 U. S. 544). This court has also held in *Ogden v. City of New York* (141 App. Div. 578) that where the city constructs public docks for which it is to receive rent and dockage charges and in so doing excavates a public street leading thereto so that an abutting owner is cut off from access to his property for two years and part of his land falls into the excavation for lack of lateral support, he is entitled to recover substantial damages. This was upon the ground that the excavation was not for a street use, but on the contrary the city was embarking in a business enterprise from which it was to receive compensation, so as to make it liable like any other person or corporation engaged in a similar enterprise. That case was decided upon the authority of *Matter of Rapid Transit Railroad Commissioners* (197 N. Y. 81) and *Muhlker v. Harlem Railroad Co.* (197 U. S. 563). While I dissented from the conclusion reached by the court therein, the determination of the court is binding upon us. So also the Appellate Division of the

Second Department in *Bradley v. Degnon Contracting Co.* (157 App. Div. 237) held that the use of Seventy-ninth street in the borough of Brooklyn from Fourth avenue to the Shore road, a distance of half a mile, for a tramway whereon to transport earth filling for use in constructing a sea wall in connection with the subway construction in said borough was not a highway use, and that, therefore, the abutting owners were entitled to an injunction which the Special Term had granted restraining the laying and use of the tramway, no compensation having been provided for to the abutting owners. The court said: "When the whole facts are before the court at Trial Term, the court may determine whether it will award injunctive relief absolutely, or conditionally, upon the failure of defendants to make such provision as it may direct for the indemnification of the plaintiffs against such damages as may follow. It is, of course, desirable that these great public works should be expedited in every way consistent with the protection of individual rights, but the fact that the public at large may be benefited will not justify the imposition of undue burdens upon a special locality and an invasion of the legal rights of individuals in such localities."

The conclusion to be deduced from these cases, therefore, is that the plaintiff, as the lessee of the land abutting on the street, had an easement in the highway for light, air and access by reason of the situation of his property; that such easement constituted property which could not be taken from him without just compensation; that the city in constructing the subway, through its contractor, was discharging a proprietary and not a governmental function; that its liability was that of a railroad corporation; and that a railroad corporation is liable for any interference with the easement of light, air and access. All this although the work was done without negligence, in the most approved manner, and for the furtherance of a great public convenience. So the United States Supreme Court in *Muhlker v. Harlem Railroad Co.* (197 U. S. 544) held that an abutting owner could not be deprived of his easements of light and air above the surface of the street without compensation, even though the raising of the structure in front of his premises from a surface to an elevated one gave him an increase in his easement of access, and in so holding

App. Div.]

First Department, June, 1917.

said (p. 571): " They [the cases] are collected in 1 Lewis Eminent Domain, section 91c, and, it is there said, 'established beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves.'" Nor are we unmindful of the danger in upholding plaintiff's right to recover, that unless provision is made for the compensation of abutting owners under such conditions as have been disclosed by this record it will be possible to enjoin the prosecution of a great public work until provision has been made for the adequate protection of the rights of owners, and that the furnishing of such protection, to the satisfaction of the court, will be a matter of great difficulty because of the uncertain and speculative character of much of the damage which must ensue and which can only develop during the prosecution of the work itself. But this does not affect the application of the principle enunciated in the cases which have been cited, and the judgment, therefore, must be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, SMITH and DAVIS, JJ., concurred
Judgment affirmed, with costs.

ESTELLE P. ANDERSON, Respondent, v. STEINWAY & SONS,
Appellant.

THE CITY OF NEW YORK, Amicus Curiae.

First Department, June 8, 1917.

Vendor and purchaser — specific performance of contract to convey land — effect of municipal ordinance regulating use of land enacted between date of contract and consummation thereof — when purchaser will not be compelled to take property — when municipal ordinance may be attacked as unreasonable.

Where an owner of a plot of land agrees to convey free from all incumbrances, except a covenant against nuisances, and the purchaser agrees to buy upon said terms, intending to erect upon the property a business building, and having no other use for the property, and at the time of the execution of the contract there is no restriction upon the use to which the property may be put except the covenant against nuisances, and between

said date and the day upon which the sale is to be consummated the board of estimate and apportionment of the city of New York, acting under legislative authority, adopts a resolution preventing the use of the property intended by the purchaser, which resolution could not have been reasonably anticipated by the parties, a court of equity will not compel the purchaser to specifically perform his agreement.

As a general rule, a purchaser will not be compelled to take property, the possession of which he will be obliged to defend by litigation.

The resolution of the board of estimate and apportionment adopted under authority of the Legislature, but not specifically ratified after adoption, may be attacked upon the ground that it is unreasonable, and to support this claim evidence may be introduced.

APPEAL by the defendant, Steinway & Sons, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of January, 1917, granting plaintiff's motion for judgment on the pleadings, consisting of a complaint, an amended answer and a demurrer thereto.

Walter B. Solinger, for the appellant.

Robert W. Bonynge, for the respondent.

Samuel P. Goldman and *Walter F. Peacock*, for the Real Estate Board of New York, intervenor.

Terence Farley of counsel [*Leon N. Futter* with him on the brief] for the City of New York, amicus curiae.

SCOTT, J.:

The action is one by a vendor against a vendee for the specific performance of a contract for the sale and purchase of real estate. The pleadings consist of a complaint, and an amended answer containing a counterclaim, and a demurrer thereto. The plaintiff moved for judgment on these pleadings and her motion was granted. The defendant appeals.

The complaint sets forth that on July 13, 1916, plaintiff and defendant entered into a contract for the sale and purchase of a certain piece of real estate belonging to plaintiff, and that defendant thereupon paid the sum of \$3,000 on account of said purchase; that on the 1st day of August, 1916, at the time and place specified in the contract, plaintiff

App. Div.]

First Department, June, 1917.

duly tendered performance on her part, and demanded that defendant should perform on its part, which it refused to do. The judgment demanded is that defendant be required to specifically perform the contract which is annexed to the complaint and by reference made a part thereof.

The contract is in the usual form and describes a piece of property on the southerly side of West Fifty-eighth street in the city of New York, between Sixth and Seventh avenues. The sale is to be made subject to certain restrictions and covenants embraced in a deed made in 1868, and which cut no figure in the present controversy. It is agreed that the property shall be conveyed to the purchaser by a deed containing the usual full covenants and warranties so as to convey to the purchaser the fee simple of the premises above described "free of all incumbrances except as herein stated." The contract contains the following unusual and significant clause: "It is further understood and agreed between the parties hereto that the purchaser has entered into contracts for the purchase of premises Nos. 109, 111, 113 West 57th Street and 114 West 58th Street, and that the performance of the covenants contained in this contract is dependent upon the simultaneous delivery both as to time and place of the respective deeds for the said premises Numbers 109, 111 and 113 West 57th Street and Number 114 West 58th Street. If upon the examination of the title to the parcel of land above described it shall be found unmarketable, or if upon the examination of title to premises Numbers 109, 111 and 113 West 57th Street and Number 114 West 58th Street, the title thereof or of some portion thereof shall be found unmarketable, then in either case the purchaser shall not be obligated to take title under this contract, but the money paid upon the execution of this contract shall be returned to the purchaser and this contract shall be cancelled, except that in case the defect in title making the title unmarketable, as aforesaid, shall be found to exist in respect of the parcel of land herein described, then the seller shall also pay to the purchaser the reasonable expenses of the purchaser in the examination of the title to said premises, but said expenses shall in no event exceed the net amount of the cost of examination of said title by a Title Insurance Company."

The significance of this clause, in so far as it bears upon the present controversy, is that it shows that both parties understood that defendant was attempting to buy a plot of land comprising three houses and lots on West Fifty-seventh street, and two houses and lots on West Fifty-eighth street, and that if it could not acquire the whole plot, it did not desire to acquire any portion of it. The answer admits, in effect, all of the allegations of the complaint except as to plaintiff's readiness and ability to perform on her part.

The answer further alleges, by way of defense and counterclaim, that plaintiff knew when the aforesaid contract was made and immediately prior thereto that defendant, as the purchaser of plaintiff's property and the other lots constituting the plot aforesaid, intended to immediately demolish all of the buildings on said plot and to erect upon the entire plot, both in width and depth, a business building ten stories in height fronting on Fifty-seventh street, and six stories in height fronting on Fifty-eighth street to be used as piano ware-rooms and lofts and in which defendant proposed to conduct its business and from which shipments of pianos were to be made; that defendant was not buying the property as a real estate investment, but solely for the purpose of erecting a warehouse thereon.

That in and by chapter 470 of the Laws of 1914, as amended by chapter 503 of the Laws of 1916* of the State of New York, there were added sections 242a and 242b to the Greater New York charter, providing therein that the board of estimate and apportionment be and it is authorized to divide the city of New York into districts and to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, having first appointed a commission to recommend the boundaries of districts and appropriate regulations to be enforced therein.

That on June 26, 1914, the board of estimate and apportionment duly appointed a commission on "Building Districts and Restrictions," consisting of sixteen members, to recommend the boundaries of districts and appropriate regulations to be enforced therein.

* *Sic.* See Laws of 1916, chap. 497.—[R.R.P.]

App. Div.]

First Department, June, 1917.

That the commission thus appointed entered upon an investigation of the subject referred to it, and in due time made a report thereon to the board of estimate and apportionment. The answer sets forth certain extracts from said report which it is unnecessary to repeat here, and then continues:

" *Tenth.* That on July 25th, 1916, and intermediate the making, execution and delivery of the contract and the date fixed therein for the delivery of the deed by the plaintiff, the Board of Estimate and Apportionment of the City of New York, pursuant to the power and authority delegated to it, duly passed a Building Zone Resolution to take effect immediately, therein dividing the City into three classes of districts: (1) residence districts; (2) business districts; (3) unrestricted districts, which are shown on a use district map made a part of the resolution, and by the resolution it is provided that in a residence district no building shall be erected other than a building with its usual accessories, arranged, intended, or designed exclusively for certain specific uses; that such specified uses exclude and thereby prohibit the erection or use of any building or premises within such district for business purposes. That hereto annexed is a copy of the Zone Resolution marked ' B ' which is hereby made a part of this answer.

" *Eleventh.* That by the resolution and by the use district map the block on 58th Street, between Sixth and Seventh Avenues, was designated as a residence district.

" *Twelfth.* That the plaintiff's property Number 112 West 58th Street and the property of Peachy J. Flagg, are included and embraced within said block and are located within the residence district aforesaid. That hereto annexed is a drawing marked ' C ' showing the residence district, which is hereby made a part of this answer.

" *Thirteenth.* On information and belief, that neither the plaintiff nor Peachy J. Flagg, or either of them, are now nor were they on August 1st, 1916, able or ready to convey the fee simple of either of the premises 112 West 58th Street and 114 West 58th Street to the defendant, free from all encumbrances or building restrictions not included in the exceptions specified in the contract of July 13, 1916. That the Statute Law and the action of The City of New York and the resolution adopted by its Board of Estimate and Apportionment on

July 25, 1916, has made it impossible for the plaintiff to perform her contract, and that the title to the said premises is unmarketable.

"*Fourteenth.* That the defendant on August 1, 1916, was and still is ready, upon the conditions specified in said contract, to perform the obligations imposed upon it by the terms of the contract."

The resolution of the board of estimate and apportionment attached to and by reference made a part of the answer shows that in a residence district, such as the block in which plaintiff's property was declared to be, no building might be erected, other than a building with its usual accessories, intended or designed exclusively for one or more of eight specified uses, two of which are clearly inapplicable to the plaintiff's property, and none of which include the use to which defendant intended to put the building it designed to build, or any other business use except boarding houses and hotels of a certain size.

The defendant, therefore, demands judgment that the complaint be dismissed and that it recover back its part payment, having a lien therefor on the premises.

The demurrer to the answer, which is for general insufficiency, of course admits all the relevant allegations therefor.

The case then, briefly stated, is as follows: Plaintiff agrees to convey a plot of land free from all incumbrances, except a covenant against nuisances. Defendant agrees to buy upon these terms, intending to erect upon the property a business building, and having no other use for the property.

At the time the contract of sale is made there is no restriction upon the use to which the property may be put, except the covenant against nuisances, whether imposed by contract, covenant in the chain of title or legal enactment.

Between the date of the contract and the day upon which the sale is to be consummated the board of estimate and apportionment of the city of New York, acting under authority conferred by the Legislature, adopts a resolution which, if valid, has the force and effect of law, whereby the uses to which the property may be put are very greatly restricted, and especially is the use to which defendant intended to put the property, and for which alone it agreed to buy it expressly prohibited.

App. Div.]

First Department, June, 1917.

Under these circumstances will a court of equity compel a vendee to specifically perform his agreement? There can be no doubt that such a restriction upon the uses to which the property may be put under the resolution of the board of estimate and apportionment, would if imposed by a covenant found in the chain of title and running with the land, constitute an incumbrance and absolve defendant from its contract to purchase it. (*Terry v. Westing*, 5 N. Y. Supp. 99; 52 Hun, 610.) This as we understand is conceded by the plaintiff, respondent, and it is unnecessary to elaborate the point further, or to cite other authorities to sustain it. But it is said that such a restriction upon the use to which the property may be put, if imposed by legislative or municipal authority, while it may operate as an incumbrance on the property and affect its marketability, is not such an incumbrance as may be availed of by a vendee to avoid his agreement to purchase it, and it is this view which seems to have been taken by the learned justice at Special Term. We are cited to no cases, and have been unable to find any, which make this distinction where, as in the present, the restriction or incumbrance was imposed upon the property between the time of making the contract and the time fixed for the passing of the title. Undoubtedly if a person contracts to purchase a building, such as a tenement house or a factory, which is restricted as to the manner of its use by laws and ordinances existing when the contract is made, he will be chargeable with a knowledge of these restrictions and will be deemed to have contracted to purchase the property subject to them. So if defendant had contracted to buy the property in question here *after* the so-called zoning resolution had been adopted by the board of estimate and apportionment, and had become a part of the public law, it may well be that it could not be heard to object to taking title because of the restrictions imposed upon the use of the property by such resolution. (*Bennett v. Buchan*, 76 N. Y. 386; *Neeson v. Bray*, 19 N. Y. Supp. 841.) But that is not the case we have here. The plaintiff agreed and intended to sell a piece of property freed from any restrictions upon its use, except as to nuisances. Defendant agreed to buy and understood that it was to buy

a piece of property so unrestricted, and would not have agreed to buy it if it had been restricted. After the contract was made the law-making power steps in, and takes action which makes it impossible for the plaintiff to convey what she had intended and expected to convey, and for defendant to acquire what it had intended and expected to acquire. Under these circumstances it would seem to be most unfair for a court of equity to exercise its discretionary power to compel defendant to specifically perform.

In *Willard v. Tayloe* (75 U. S. [8 Wall.] 557, 566) it appeared that to enforce the contract as it was written would compel the vendor to accept the purchase price of certain property in the legal tender of the country which, at the time for performance, had greatly depreciated and was worth not more than half of the value of gold coin which was the legal tender when the contract was made. The Supreme Court of the United States refused to award specific performance to the vendee unless he would pay the purchase price in gold coin. After citing many cases to show that specific performance was not and never had been a matter of strict right, but rests in the discretion of the court, the court went on to say: "It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, in its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties."

The same rule was adopted in this State in *Gotthelf v. Stranahan* (138 N. Y. 345). In that case between the time the contract was made and the day on which title was to pass, the city of Brooklyn had levied substantial assessments upon the property in anticipation of certain street improvements to be made in the future, and which when made would greatly enhance the value of the property contracted to be sold. The terms of the contract were such that it appeared to be incumbent upon the vendor to pay these assessments before he could give a marketable title, although the injustice of compelling him to do so was manifest. In an action by the

App. Div.]

First Department, June, 1917.

vendee to compel specific performance the Court of Appeals said: "Where by reason of circumstances which have intervened between the making of the contract and the bringing of the action, the enforcement of the equitable remedy would be inequitable and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches, or inattention by the party resisting performance, in not foreseeing and providing for contingencies which have subsequently arisen, the court may and will refuse to specifically enforce the contract, and will leave the party to his legal remedy." In each of these cases the contract was clear and explicit in its terms, and the circumstances which had arisen after it was made, and which as it was considered rendered it inequitable to compel its specific performance, had occurred without any act by either party to the contract, and was of a nature which neither party could reasonably have anticipated when the contract was made.

In principle the present case is very similar to these. Neither party to the contract could, when it was made, have reasonably anticipated that before the time came for closing the title the law-making power would step in and impose such restrictions upon the use of the property, as would render it useless to defendant for the only purpose for which it sought to acquire it.

Under these circumstances it would, in our opinion, be plainly inequitable to compel defendant to specifically perform the contract. But the plaintiff further argues that if a valid restriction upon the use of the property such as was imposed by the resolution of the board of estimate and apportionment would constitute such an incumbrance as would relieve the vendee from its obligation to take title, still this particular resolution does not impose any restriction because it is wholly invalid. Her argument is that by limiting the uses to which her property may be put, the effect of the resolution is to deprive her, to an extent, of her property, for it is particularly true of real estate that its value lies in the right to use it, and if that right be restricted the value is presumably *pro tanto* destroyed. This is claimed to be unconstitutional, both under the State and Federal Constitutions, because it deprives

her of her property without due process of law and without compensation. A few years ago this contention might have been plausibly supported by many cases, but since certain decisions in the Supreme Court of the United States, and in our own Court of Appeals there seems little prospect of redress for an owner whose property has been destroyed, or seriously reduced in value as an incident to the exercise by the State of its reserved police power. (*Reinman v. Little Rock*, 237 U. S. 171; *Hadacheck v. Los Angeles*, 239 id. 394; *Barrett v. State of New York*, 220 N. Y. 423.)

We do not propose to be drawn into a discussion of the very interesting constitutional question thus raised, or to express any opinion thereon. If the restriction be valid, as has already been said, it suffices to make a decree for specific performance inequitable, and even if there be a doubt as to its validity still the defendant should not be compelled to accept the title and take with it a law suit over the validity of the restriction.

It is a general rule that a purchaser will not be compelled to take property the possession of which he will be obliged to defend by litigation. (*Dyker Meadow L. & I. Co. v. Cook*, 159 N. Y. 7; *Heller v. Cohen*, 154 id. 306.) It is true that this rule is usually applied when the defense of the title will involve a matter of evidence which may not be available to the purchaser when called upon to defend his title, but its application is not exclusively confined to such cases. In *Daniell v. Shaw* (166 Mass. 582), which was an action for specific performance brought by a vendor against a vendee, the property was found to be incumbered by restrictions imposed by an act of the Legislature. The plaintiff insisted that the apparent incumbrance was no incumbrance at all because of the unconstitutionality of the act, but the court refused to decree specific performance, saying: "The defendant would be exposed to the chance of such litigation if compelled to accept the title now offered. * * * The plaintiff asks us to declare his title good by declaring the statute unconstitutional. The defendant ought not to be compelled to accept such a title." Nor is it at all certain that the validity of the restriction, so far as it concerns the particular lot covered by the contract between these parties, may not involve a question

App. Div.]

First Department, June, 1917.

of fact to be determined upon evidence. It is well settled that in the case of an act of the Legislature, or of a municipal ordinance which has been expressly ratified by the Legislature, evidence may not, as a general rule, be introduced for the purpose of showing that the statute or ordinance is unreasonable and, therefore, unconstitutional, while in the case of an ordinance or municipal regulation, adopted under authority of the Legislature, but not specifically ratified after adoption, it may be attacked on the ground that it is unreasonable, and to support this claim evidence may be introduced. (*Matter of Stubbe v. Adamson*, 220 N. Y. 459.)

The resolution of the board of estimate and apportionment setting aside the single block upon which plaintiff's property stands falls within the latter category of a municipal regulation adopted pursuant to discretionary authority vested in the board by the Legislature, but never so far as appears specifically ratified by the Legislature. It may, therefore, be attacked as unreasonable and on that issue it seems that evidence may be taken. Whether such an attack would be likely to succeed we need not now inquire. Certainly the defendant should not be compelled to assume the burden of making it. Furthermore, there may be some doubt whether defendant, if it took title to the property with the incumbrances on it, would be in a position to attack it.

For all these reasons we are of the opinion that plaintiff has failed to make out a case for the equitable remedy of specific performance.

The order appealed from is, therefore, reversed, with ten dollars costs and disbursements to the defendant, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

WILLIAM KNIGHT and Others, Copartners, Composing the Firm of KNIGHT & McDUGAL, Appellants, Respondents, v. THE DELAWARE AND HUDSON COMPANY, Respondent, Appellant.

First Department, June 8, 1917.

Carriers — conversion — diversion by defendant of carloads of grain on bills of lading for which plaintiffs had made advances — knowledge by plaintiffs as to diversion of merchandise represented by earlier bills of lading.

Where in an action for damages resulting from the diversion by the defendant of certain carloads of grain, the bills of lading for which plaintiffs held and had made advances upon, it appears that the bills of lading actually represent grain received by defendant and in its possession when plaintiffs made the advances, it will be held that the plaintiffs acquired a special property in the grain, and that when defendant permitted it to be diverted into other hands it committed a conversion of plaintiffs' property which it could justify only by showing actual consent or acquiescence on the part of the plaintiffs.

Evidence examined, and *held*, insufficient to establish such consent or acquiescence.

The fact that plaintiffs had knowledge that merchandise represented by other and earlier bills of lading upon which they had made advances had been diverted without their consent, is insufficient as a defense, although it should have aroused the plaintiffs' suspicions.

Action for damages caused to plaintiffs by reason of having made advances upon bills of lading issued by defendant which did not represent and never had represented any actual merchandise. *Held*, that the complaint was properly dismissed on the ground that when plaintiffs made the advances they had reason to believe that the statements made in earlier bills of the same description were untrue, and hence their advances were not made in good faith and in reliance upon the bills of lading.

DAVIS, J., and CLARKE, P. J., dissented, with opinion.

CROSS-APPEALS by the plaintiffs, William Knight and others, and by the defendant, The Delaware and Hudson Company, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 18th day of September, 1914, upon the report of a referee appointed to hear and determine the issues.

Herman Aaron, for the plaintiffs.

Morgan J. O'Brien, for the defendant.

App. Div.]

First Department, June, 1917.

SCOTT, J.:

The complaint states two causes of action. The first is for damages resulting from the diversion by defendant of certain carloads of grain the bills of lading for which plaintiffs held and had made advances upon. This cause of action rests upon tort. The second cause of action is for damages which plaintiffs suffered by reason of having made advances upon bills of lading issued by defendant which did not represent and never had represented any actual merchandise. This cause of action rests upon estoppel. (*Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195.)

As to the second cause of action the referee dismissed the complaint on the ground that when plaintiffs made the advances upon the bills of lading comprised within that cause of action they had reason to believe, and must have known or believed, that the statements made in earlier bills of the same description were untrue, or, at least, had such knowledge or information as to put them upon inquiry as to the genuineness of the bills upon which they were making advances. He, therefore, concluded that such advances were not made in good faith, and in reliance upon the bills of lading, and consequently that plaintiffs were not entitled to the benefit of the rule stated in the *Bank of Batavia Case* (*supra*). With this conclusion we all agree.

The only question in the case upon which we are not agreed is as to the first cause of action upon which the referee has awarded judgment to the plaintiffs. The bills of lading upon which that cause of action is based did actually represent grain which had been received by defendant and was actually in its hands when plaintiffs made advances upon them. They thereby acquired a special property in the merchandise, and when defendant permitted this merchandise to be diverted into other hands it committed a conversion of plaintiffs' property. This conversion it could justify only by showing actual consent or acquiescence on the part of plaintiffs and this defense it failed to establish. It may be, as defendant strenuously argues, that plaintiffs had knowledge that merchandise represented by other and earlier bills of lading upon which they had made advances had been diverted without their consent. But such knowledge falls far short of a consent

to such diversion of the merchandise represented by the later bills. Of express consent to such diversion there is absolutely no evidence. The most that can be said is that there were certain circumstances relating to earlier transactions which should have aroused plaintiffs' suspicions, and that as prudent men they should have refrained from dealing with bills of lading issued by defendant to Durant & Elmore, from whom plaintiffs received them. To uphold this defense would be equivalent to permitting a tortfeasor to escape the consequences of his wrongdoing by pleading that his reputation was so bad that no one was justified in relying upon his representations. This is not the law. We are, therefore, of the opinion that the referee rightly disposed of both causes of action and the judgment is consequently affirmed, with costs.

PAGE and SMITH, JJ., concurred; CLARKE, P. J., and DAVIS, J., dissented.

DAVIS, J. (dissenting):

The judgment was in favor of the defendant on plaintiffs' second cause of action and with certain modifications in favor of the plaintiffs on their first cause of action.

I do not agree with the opinion of a majority of the court that the plaintiffs' judgment on the first cause of action should be affirmed. In my opinion the judgment in that respect should be reversed.

The plaintiffs are grain brokers and grain commission merchants engaged in business on the New York Produce Exchange and the Chicago Board of Trade. The defendant is a corporation operating a railroad in the central and northeasterly part of New York State. Through its connection with the Erie railroad, the Lackawanna railroad and by trackage rights over the Erie with the Lehigh Valley railroad at Owego, it becomes a connecting link between the Boston and Maine railroad and the three trunk lines just mentioned.

As a first cause of action plaintiffs allege that they are holders for value of certain order bills of lading for 124,965 bushels of corn and 16,500 bushels of oats issued to them in January, 1910, received by the defendant for shipment over its road; that under these order bills of lading the defendant was bound to deliver the grain represented by the bills

only upon the surrender to it of the bills of lading properly indorsed; that defendant, in disregard of its obligation, *diverted* said grain from plaintiffs and caused it to be delivered to others than the plaintiffs without first receiving plaintiffs' bills of lading, and issued therefor other order bills of lading covering said grain certifying and declaring that it received said grain from persons other than plaintiffs and agreeing in said latter bills of lading to deliver said grain only upon the surrender of said bills of lading, ignoring entirely the existence of the bills of lading held by plaintiffs, and that said grain was reasonably worth \$97,499.04.

The answer to the first cause of action admits the receipt of the grain represented by some of the bills of lading, but alleges that the grain it received and transported was the property of the Durant & Elmore Company; that the Durant & Elmore Company assumed full control of the grain and had diverted it from its original destination and directed its transportation to persons and places designated by it and that all this had been done by the Durant & Elmore Company with the assent of the plaintiffs, who in fact were not *bona fide* pledgees of said bills of lading. The answer also alleges: That the plaintiffs permitted the said Durant & Elmore Company to hold itself out to the carriers transporting such grain, including the defendant, as the owner thereof, or as authorized to act and direct in the movement and disposition thereof as the owner thereof and to collect and receive the proceeds derived from the ultimate disposition of said grain; and that the defendant was justified, from all the facts and circumstances connected with the receipt of said grain by it and with its final disposition so far as the defendant was concerned therewith, in believing and did believe that the said Durant & Elmore Company was the owner of said grain and that no other person or corporation had any right thereto or interest therein, and that said company might lawfully direct the defendant as to the movement and disposition of said grain when it was so received by it as admitted herein, and so believing, the defendant transported and delivered said grain in compliance with the orders and directions of said company and in so doing discharged its full obligation with reference thereto.

The plaintiffs held these bills of lading ostensibly as pledgees of the grain represented thereby to secure the payment of drafts drawn upon them by the Durant & Elmore Company, a corporation doing business at Albany as dealers in grain and owners of the grain referred to here. Judgment was entered in favor of the plaintiffs on the first cause of action for \$73,956.79, the recovery being limited to the amount for which the grain was pledged and interest. The defendant appeals from so much of the judgment as awards this recovery to the plaintiffs.

In their second cause of action plaintiffs sought to recover \$144,225 upon certain other bills of lading issued in January, February and March, 1910, by one H. C. Palmer, an agent of the defendant, which bills of lading indorsed by the Durant & Elmore Company were transferred and delivered by the Durant & Elmore Company for value to the plaintiffs and upon which the plaintiffs, relying upon these bills of lading, paid out therefor and advanced to the Durant & Elmore Company \$144,225.

As a defense to the second cause of action defendant alleges that the bills referred to and relied upon by plaintiffs were fraudulent and fictitious and did not represent actual shipments and that the defendant at no time became liable thereon; that Palmer had no authority to issue the bills; that the purported bills of lading were in such form and contemplated the movement of the grain over such routes, and came into the possession of plaintiffs under such circumstances, as to give plaintiffs notice of their fraudulent character; that plaintiffs were put upon notice to ascertain the authority of the person executing and issuing the bills on behalf of defendant and the fact of the property mentioned in them being in the possession of defendant in order to entitle them to rely thereon as valid securities; that had they made inquiry the false and fraudulent character of said bills would have been revealed to the plaintiffs and that, therefore, plaintiffs were not innocent purchasers and holders of said bills of lading without notice of their invalidity.

The bills mentioned in the second cause of action are known as the Palmer bills and are concededly fraudulent. The bills mentioned in the first cause of action are known

App. Div.]

First Department, June, 1917.

as New England bills. The plaintiffs made their first advance on the Palmer bills January 8, 1910, and their last advance on March 12, 1910. The advances on the bills of lading mentioned in the first cause of action were made between November 16, 1909, and February, 1910. In dismissing the second cause of action upon the ground that the plaintiffs were not holders of the Palmer bills of lading in good faith, the learned referee in the course of his opinion says:

"The Palmer bills in suit were part of a series of similar bills upon which plaintiffs made advances to Durant & Elmore Company beginning January 7, 1910. At that time the plaintiffs held a large amount of New England bills on which they had made very large advances to Durant & Elmore Company — bills which had been so long outstanding that a man of ordinary intelligence could hardly have avoided suspicion that Durant & Elmore Company had somehow got control of the grain and disposed of it, especially if he knew of their doings with respect to grain in Buffalo elevators, * * * but I think that from past experience the plaintiffs on January 7, 1910, must have had a suspicion that the grain covered by the New England bills which they held had, all or some of them, got into Durant & Elmore Company's control and been disposed of, and if they had no such suspicion, then they must have thought that Durant & Elmore were carrying a very heavy load of grain which they had been unable to sell and were likely to be able to sell only at a very heavy loss. It seems to me that they must have had suspicion of dangers of one kind or another, so that when the Palmer bills came to them they came to persons whose minds were already charged with suspicion, and such suspicion must have grown from the date of their first advance upon such bills, January 8th, to the date of the last of their advances involved in this suit, March 12th."

The referee's finding of fact which led to the dismissal of the second cause of action is supported by abundant and convincing evidence. But I am of opinion that the evidence required the dismissal of the first cause of action as well. The first cause of action is for the conversion of grain by defendant, for which the plaintiffs held bills of lading upon which they had made advances to the Durant & Elmore

Company. The alleged conversion consisted in the defendant delivering to the Durant & Elmore Company or to its order, grain represented by the bills of lading held by plaintiffs, without first obtaining the surrender of those bills. The result was that when the Durant & Elmore Company became insolvent on May 20, 1910, the plaintiffs held New England order bills of lading specifying 16,500 bushels of oats consigned to Portland and 124,965 bushels of corn consigned to Boston, and Palmer bills calling for 15,000 bushels of rye, 97,500 bushels of oats and 151,000 bushels of corn consigned to New York city, upon which at that time they could not obtain a single bushel of grain. The New England bills were dated between November, 1909, and February 1, 1910, and the Palmer bills were dated between February 1, 1910, and March 11, 1910. The unpaid balance due plaintiffs for advances on the former at the time of the failure was \$63,537.86 and on the latter \$144,225. The question at issue under the first cause of action was whether or not the plaintiffs consented to and acquiesced in the defendant's allowing the Durant & Elmore Company to take possession of the grain without first requiring the surrender of the bills of lading then in the possession of the plaintiffs. The plaintiffs have recovered on this first cause of action upon the theory that they were *bona fide* holders of the bills of lading in a normal transaction between themselves and the Durant & Elmore Company in which they had made advances to the Durant & Elmore Company, secured by the bills of lading with the expectation on their part that the defendant railroad would not give up the grain represented by those bills except upon presentation of the bills of lading and in accordance with their terms. The evidence shows quite conclusively that whatever might have been the character of the first few transactions between the plaintiffs and the Durant & Elmore Company, the dealings between them set forth in the first cause of action were carried on pursuant to a well-defined understanding between plaintiffs and Durant & Elmore that so long as the Durant & Elmore Company paid the plaintiffs six per cent on their advances and half a cent per bushel on the grain specified in the bills of lading and allowed plaintiffs to retain the bills of lading the Durant & Elmore Company

App. Div.]

First Department, June, 1917.

were at liberty to get possession of the grain from the railroad and distribute it to its customers. The plaintiffs did not rely upon the security of the bills of lading for repayment of their advances, but upon their unbounded confidence in the genius and character of the Durant & Elmore Company's manager, Oliver, and the excellent credit of the Durant & Elmore Company itself. It was important for plaintiffs to have the bills of lading for use at their bankers, from whom they were borrowing a large part of the money they were advancing to the Durant & Elmore Company and to whom they never revealed the fact that Oliver was habitually getting possession of the grain without surrendering the bills of lading. These conclusions not only follow most naturally from the evidence, but are compelled by the evidence. It is not possible to rehearse within the limits of this opinion all of the evidence upon this issue. But reference will be made to parts of it. On this point the letter of the plaintiff Knight to Oliver dated December 1, 1909, is illuminating. Apparently Oliver had shipped out from an elevator in Buffalo certain grain for which plaintiffs then held the original bills of lading. Knight writes: "* * * Of course you understand that these B/L are practically useless to us, as the grain they represent has been shipped out of the elevator. Of course, we know it is all right with you, but we could not explain this matter to the banks, and we need all the collateral we have at present. We therefore hope you will clean these up rapidly, and be sure that no more is ordered out, at least until these are out of the way * * *." Being cross-examined as to the contents of this letter Knight said: "I believed it was all right with Durant & Elmore, because I believed that they were morally and financially responsible." The expression "clean up" is frequently used by the plaintiffs in their dealings with Oliver and means payment of the loans made by the plaintiffs to Durant & Elmore. Here is a definite assent to Durant & Elmore's diversion of grain while the bills of lading were in plaintiffs' possession, provided the former drafts were paid and the bills of lading against which they were drawn were gotten out of the way. They knew the bills of lading were valueless as security after the grain had been shipped out of the elevators, but they

nevertheless used them as collateral at their banks, concealing from the banks the unsubstantial character of the bills. In view of the suggestion contained in this letter, it is not strange that Durant & Elmore thereafter continued its practice of diverting grain in transit regardless of the bills of lading and that the plaintiffs continued making advances on bills of lading representing diverted grain. The scheme was much more profitable than a normal transaction. Again in August, 1908, the plaintiffs having been notified by the Spencer Kellogg Elevator that Durant & Elmore had ordered them to ship out certain grain then in the elevator and for which plaintiffs held bills of lading, wrote the elevator as follows: "Will you please, therefore, not ship out any more without our knowledge, but of course do not let Durant & Elmore know that we have given you these instructions. When they order any grain out, advise us and we will let you know if it is all right, *which it doubtless will be.*"

On the same day the plaintiffs wired Durant & Elmore that they had heard of their ordering out the grain from the elevator and inquired where it was and when they could collect on their bills of lading. That this conduct of Durant & Elmore was acceptable to plaintiffs is shown in letters written by plaintiffs to the elevator.

On August 15, 1908, they wrote: "We have your favor of the fourteenth, and contents noted. It is all right for you to take instructions from Durant & Elmore on the balance of the grain we have written you about. They have instructed us to draw on them. We find that one of the firm was away yesterday, which accounts for our inability to get an answer from them." This correspondence is convincing proof of plaintiffs' hearty co-operation with Durant & Elmore's plan to divert grain in transit without surrender of the bills of lading. On August eighteenth plaintiffs wrote: "You may take their instructions on the 'Harlem' cargo to forward, and on any other future shipments which may go through your elevator for their account, as per our instructions heretofore given you, but we would thank you to advise us when you receive such instructions, so that we can be guided accordingly."

Coming down to November 30, 1909, plaintiffs wrote

App. Div.]

First Department, June, 1917.

Oliver: "Another point which I know you will realize the importance of, is to relieve us of any lake Bs/L representing grain which has been shipped out of the elevator at Buffalo. We understand the 'Squire' and the 'Culligan' lots of oats have been at least in part shipped out, and we would therefore like to clean these lots up. * * * We think if you will clean up some of these old lots of rail grain and the lots you have ordered out of Buffalo, *that we will be able to take care of all the corn you have coming.*" Then follows the letter of December 1, 1909, referred to above.

The plaintiffs first began doing business with Durant & Elmore in 1905. They never knew anybody except Oliver in those transactions, and the intimacy between the plaintiff Knight and Oliver became exceedingly close as is shown by the familiar and affectionate manner in which they addressed each other in their letters. The advantage derived by the plaintiffs from their intimacy with Oliver is shown by the fact, as found by the referee, that "during the year before the failure plaintiffs were receiving from Durant & Elmore commissions from speculative transactions at the rate of over \$75,000 a year, and from commissions on bills of lading held and sent back to Albany over \$20,000 a year." In addition to these commissions plaintiffs charged Durant & Elmore six per cent interest per annum on their advances, while they paid their banks in New York considerably less than six per cent. The plaintiffs sold little or none of the grain specified in these bills of lading. The interest on advances and the so-called commissions received by them made up their compensation for their loans to Durant & Elmore. The referee has found that "* * * plaintiffs did not receive or sell, as commission agents, any of the grain specified in these New England bills; the sole function of plaintiffs being to advance to Durant & Elmore money upon the security of said * * * bills until such a time as Durant & Elmore would instruct plaintiffs to send the bills back to Albany attached to drafts * * *." In order to meet the loan requirements of Durant & Elmore, it was necessary for plaintiffs to borrow from their banks. For this purpose they had to use the bills of lading as collateral. At the same time in order to enable Durant & Elmore to carry on its speculations

with the grain and obtain funds to repay plaintiffs' loans, it was essential that Durant & Elmore should obtain possession of the grain specified in the bills of lading. The bills of lading being in the banks, Durant & Elmore could not get possession of the grain from the defendant in the regular way. However, by collusion with defendant's agent, H. C. Palmer, the grain was not forwarded to the destination named in the bills, "but was reconsigned or delivered to Durant & Elmore at Oneonta, and the bills became spent bills soon after they were issued."

The referee has also found that plaintiffs retained these bills of lading for periods varying from two weeks to three months and until Durant & Elmore instructed them to return them to Albany with drafts attached specifying the oldest bills first. "* * * With few exceptions, these instructions were given long after the period of transit had expired * * *." And notwithstanding the fact that grain spoils if kept in cars too long and demurrage charges have to be paid on unloaded cars soon after they arrive at their destination, the plaintiffs made no inquiries of the railroads as to the whereabouts or condition of the grain called for in the New England bills.

In the twenty-ninth finding of fact the referee reports that "* * * On all the evidence I find that plaintiffs, when they received the bills of lading in the first cause of action, plaintiffs' exhibits A1-A135, inclusive, must have been suspicious that the grain covered by similar bills which plaintiffs had been receiving through the previous year had, to a large extent, come into Durant & Elmore's control and been disposed of while plaintiffs held the order bills, covering the same; and that the plaintiffs at said times had notice of facts which would put a reasonably prudent man on inquiry as to whether or not Durant & Elmore were obtaining control of and disposing of the grain specified on the bills which plaintiffs were accepting and holding for Durant & Elmore; and that the facts which had come to plaintiffs' knowledge prior to said times were such that a man of ordinary intelligence could not have avoided the suspicion that Durant & Elmore were somehow getting control of the grain and disposing of it while plaintiffs held the order bills of lading." Nevertheless

App. Div.]

First Department, June, 1917.

the referee finds that "The plaintiffs did not know or assent to the disposition or delivery made by the defendant of the grain referred to in the bills of lading in suit in the first cause of action."

I think the evidence shows the plaintiffs' suspicions had ripened into positive knowledge long before they made advances on the bills of lading mentioned in the first cause of action. It may be that at first they merely suspected that Durant & Elmore in some way had obtained possession of grain without first presenting the bills of lading, but it is quite clear from the correspondence between Oliver and Knight and the testimony given by Knight, that the latter had absolute knowledge of that fact long before he made the advances on the bills sued on, and acquiesced in that mode of procedure as the one best adapted to meet the wishes and plans of Oliver, acquiescence in which on the part of Knight was absolutely necessary, if his firm were to continue receiving the usual enormous returns on the money advanced to Durant & Elmore.

On December 3, 1909, the plaintiffs made an advance of \$35,500 to Durant & Elmore on a draft to which were attached bills of lading covering the cargo of the *City of London*. At the time they made the advance plaintiffs knew that the bills were "spent" bills of lading and worthless as security. When Knight was asked on cross-examination why he did not insist upon Durant & Elmore taking up these bills immediately when he knew there was nothing behind them, he said he considered them good, "and I considered Durant & Elmore were good. * * * I didn't consider * * * that they would utilize that grain in any way." These communications and others too numerous to be detailed here emphasize the fact that the plaintiffs relied not upon the bills of lading as security for their advances, but solely upon their confidence in Durant & Elmore; that they never intended to require the carrier to hold the grain specified in those bills until the bills were surrendered to the carrier, but on the contrary were active and consenting parties to the delivery of the grain to Durant & Elmore without presentation of the bills of lading with the understanding that Durant & Elmore would

sell the grain and then pay off the advances. The one and only inquiry made by plaintiffs of the railroad as to grain specified in bills of lading held by them met with a rebuke by Durant & Elmore. The plaintiffs evidently had inquired of the railroad about grain which they expected to arrive in New York. Hearing of this inquiry, Durant & Elmore on February 11, 1910, wrote plaintiffs as follows: "By the way, please do not put tracers out for these consigned cars of ours, for it breaks up all our holding arrangements and is liable to cost us a great deal of money in demurrage. If you want anything rounded up at any time, let us know and we will do it from this end." In answer to this letter plaintiffs wrote: "Your favor of the eleventh at hand and we note carefully all you write in reference to putting tracers out on your consigned grain. We are glad to have your advice that this affects your holding arrangements and is liable to cost you money in the way of demurrage. The only thing we have done in this direction is to advise the roads here the car numbers for which we hold B/L and requesting them to see that the grain came forward promptly after reaching their lines but not to hurry it so that there will be no jam here of a whole lot of grain at one time on arrival which we trust will meet with your approval."

The learned referee was convinced that when plaintiffs received the bills of lading mentioned in the first cause of action, their former experiences with Durant & Elmore "were such that a man of ordinary intelligence could not have avoided the suspicion that Durant & Elmore were somehow getting control of the grain and disposing of it while plaintiffs held the order bills of lading."

The letters of plaintiffs already referred to certainly show beyond a reasonable doubt that plaintiffs had absolute knowledge that Durant & Elmore were getting control of the grain while plaintiffs held the bills of lading and acquiesced in the practice. Furthermore, there is no good reason why a sharp line should be drawn between the transactions set forth in the first cause of action and those preceding them. The former, like the latter, illustrated the highly profitable and unique scheme which plaintiffs and Durant & Elmore operated in concert. To say that plaintiffs were merely suspicious

App. Div.]

First Department, June, 1917.

of Durant & Elmore's conduct with reference to the grain covered by the New England bills of lading in the first cause of action is to fail to give due weight to the evidence. I am aware that plaintiffs must recover unless they had knowledge of and acquiesced in Durant & Elmore's practices. That knowledge and acquiescence have been proved beyond question.

The judgment so far as it allows a recovery against the defendant on the first cause of action should be reversed, with costs. In all other respects it should be affirmed and the complaint dismissed, with costs.

CLARKE, P. J., concurred.

Judgment affirmed, without costs.

FRANK H. HUBBARD, Appellant, v. SYENITE-TRAP ROCK COMPANY, Respondent.

First Department, June 8, 1917.

Bills and notes — action on note of business corporation executed by treasurer without authority — production of note not prima facie evidence of authority — burden of proof — evidence — execution of similar notes by treasurer — payment of notes by corporation — proof that corporation received proceeds of note.

In an action upon the promissory note of a manufacturing corporation executed by its treasurer, the production of the note by the plaintiff claiming to be a holder in due course does not establish a *prima facie* case and cast upon the defendant corporation the burden of showing its treasurer's want of authority.

The treasurer of such corporation has no implied power by virtue of his office to make promissory notes in its name, and the burden is upon the plaintiff to show, either that said treasurer in fact did have authority, expressly conferred by the by-laws or directors, or to be implied from a prior course of dealing, or that the corporation is estopped from denying such authority.

Where the by-laws of such corporation forbade the treasurer to issue notes, except upon the approval of the board of directors or its executive committee, and no such approval to the note in suit was formally given, and no executive committee was ever appointed, and it appears that the

payee of the note owned all the stock of the corporation and entirely directed its affairs, it was error to exclude evidence that other notes had been signed by the treasurer under like circumstances and had been paid by the corporation, for if such were the fact the note became a binding obligation.

It seems, that if the rights of other creditors should intervene, the burden would be upon the defendant to show that fact in order to escape liability on the note.

Moreover, it was error to reject evidence to the effect that the corporation had received the benefit of the proceeds of the note, for if that were so, it could not assert any lack of authority in its treasurer to execute the same.

APPEAL by the plaintiff, Frank H. Hubbard, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 7th day of December, 1916, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

Philip J. Britt, for the appellant.

Harmon S. Graves, for the respondent.

SMITH, J.:

The defendant is a domestic corporation engaged in the business of selling crushed stone and trap rock. This action is brought by the assignee of one Kelly to recover upon a promissory note purporting to be the note of the defendant and concededly executed by its treasurer. The complaint alleges in substance the making of the note to defendant's own order, its indorsement and delivery before maturity by defendant to one John Peirce, and its further indorsement and delivery by Peirce for value and before maturity to Kelly, plaintiff's assignor. Judgment is demanded for the face amount of the note and interest, less certain payments of principal and interest alleged to have been made. The answer is in effect a general denial and in addition sets up two defenses: *First*, lack of power in the treasurer to execute the note, and *second*, that it was accommodation paper, as Kelly knew. The complaint was dismissed at the close of plaintiff's case on the ground that plaintiff had failed to show authority in the treasurer, and plaintiff appeals.

It appeared on the trial that the directors and officers of

App. Div.]

First Department, June, 1917.

the defendant at the time the note was made were a son of Peirce and four employees of the John Peirce Company, which Peirce controlled, and that the note was made and indorsed by the defendant's treasurer and delivered to Peirce at the latter's instance. It is not claimed that Peirce gave the defendant value for the note on the delivery thereof. He thereafter, and before the note matured, asked Kelly to loan him \$7,500 on it, and Kelly did buy it for that sum after being assured that the defendant was "good," that Peirce had "spent \$300,000 or thereabouts on the proposition" and that it had practically no indebtedness. Such principal and interest as has been paid has come from Peirce.

It is contended on behalf of the appellant that the production of the note and proof of its execution by defendant's treasurer established a *prima facie* case and cast on defendant the burden of showing want of authority. The recent decision of the Court of Appeals in *Jacobus v. Jamestown Mantel Co.* (211 N. Y. 154) seems to be adverse to the appellant's contention, for it was there held that the treasurer of a manufacturing corporation has no implied power by virtue of his office to make promissory notes in its name and that no presumption of such power exists. It would seem to be necessary for plaintiff to show either that defendant's treasurer in fact did have authority — expressly conferred by by-law or directors, or to be implied from a prior course of dealing — or that defendant was estopped from denying such authority.

I am satisfied, however, that this judgment must be reversed and a new trial granted upon exception taken to the exclusion of evidence. Unquestionably the by-laws forbade the treasurer to issue notes except upon the approval of the board of directors or its executive committee, and no such approval was formally given. The proof, however, is to the effect that an executive committee was never appointed. That neither the board of directors nor the stockholders had at any time met and assumed authority over the corporation prior to the giving of this note. Proof was offered to the effect that Peirce owned all the stock of the corporation and that he entirely directed its affairs. Further proof was attempted to be made to the effect that other notes had been signed by the treasurer under like circumstances which had

been paid by the corporation. These offers were rejected. If such proof were made the corporation is not in a position to claim that the act of the treasurer directed by Peirce was unauthorized under the formal authority of the by-laws which were thus entirely disregarded. If the evidence as to Peirce's ownership of the stock had been admitted, in view of the manner in which the note was executed, within the authorities the note became a binding obligation of the corporation. (*Martin v. N. F. P. Mfg. Co.*, 122 N. Y. 165, 172.) It is not necessary here to decide whether the rights of creditors might intervene and make inapplicable the rule of law stated. If such be the fact, the burden would be upon the defendant to show the same, in order to escape liability for the making of the note in this manner authorized. Moreover the plaintiff offered evidence to the effect that the proceeds of this note in fact were received by the corporation or that the corporation received the benefit thereof. This evidence was excluded. If this fact had been proven, under well-settled authority the corporation could not assert the lack of authority in the treasurer to sign the note. (*Davies v. Harvey Steel Co.*, 6 App. Div. 166; *Curtis v. Natalie Anthracite Coal Co.*, 89 id. 61, 71; *affd.*, 181 N. Y. 543 on opinion below; *Dill & Collins Co. v. Morison*, 159 App. Div. 583.)

The judgment must, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

EUGENE LAMB RICHARDS, as Superintendent of Banks of the State of New York, Respondent, Appellant, v. JOSEPH G. ROBIN and Others, Defendants, Impleaded with LOUIS I. BARON and Others, Respondents, and WILLIAM R. CRAIG and Others, Appellants.

First Department, June 8, 1917.

Banks and banking — suit by State Superintendent to enforce statutory liability of stockholders — evidence furnishing prima facie proof of insolvency and excess of liabilities — claims filed by former Superintendent of Banks — records of public officers as evidence — powers and duties of State Superintendent — when State not estopped from enforcing liability of stockholder because transferees are brought in as additional defendants — failure of stockholder to compel indemnity by transferee — record holder and actual owner equally liable — stockholder of former bank not participating in or knowing of merger not liable — liability where transfer not recorded — escape from liability by attempt to effect transfer.

Action by the Superintendent of Banks of the State of New York to enforce the statutory liability of stockholders of an insolvent bank, one of the defendant stockholders contending that the plaintiff failed to produce competent proof to support a finding that the bank was insolvent at the time the action was brought, or that its liabilities exceeded its assets — the par value of its capital stock — by a certain amount. Evidence examined, and *held*, sufficient to establish *prima facie* the insolvency of the bank and the excess of liabilities over assets.

The inventory of assets and list of claims filed by a former State Superintendent of Banks under section 19 of the former Banking Law was, by virtue of section 922 of the Code of Civil Procedure, making a record filed by a public officer presumptive evidence of facts therein contained, properly admitted in evidence and was sufficient to establish a *prima facie* case of insolvency.

As section 19 of the former Banking Law required the Superintendent of Banks to file lists of claims "including and specifying such claims as have been rejected by him," it placed upon him the duty of ascertaining which were valid and which were invalid claims, and his act of returning claims not rejected is equivalent to an express allowance thereof.

Especially is the validity of such claims established where dividends have been declared thereon by order of the court, made on application of the State Superintendent.

A defendant stockholder cannot escape liability because the plaintiff brought in as additional defendants persons to whom bank stock had been transferred, upon the contention that he was misled by the allegations of the

supplemental complaint and thus failed to seek affirmative relief against brokers who had purchased his stock at auction for a certain customer, said stock being in the hands of the State Superintendent, irrespective of whether or no the supplemental complaint identified the stock sold to others. The plaintiff was at liberty not only to bring in the defendant as a record holder, but also the transferees, for both are liable.

Moreover, the State Superintendent was at liberty to proceed against the record holder only.

But holders of the stock of a former bank which, through merger unauthorized by and unknown to them, was incorporated into the bank now insolvent, are not liable for the statutory liability. Nor can they be held liable because after the merger the new bank carried them on its books as stockholders, for they could not be made such without their consent, express or implied, or by a waiver of the invalidity of the merger as to them.

A person who appeared as a stockholder on the books of the bank at the time it was taken over by the State Superintendent should have been charged with the liability, although the stock had been put in his name by his employer, a trust company which held it as collateral security, and even though the stock had been transferred to other parties, if no attempt was made to register the transfer.

But where a record stockholder had sold his shares, and on making inquiry was informed by a director of the bank that the transfer had been recorded, he did all that could reasonably be required of him to effect the transfer, and he is relieved from liability as a stockholder.

APPEAL by the plaintiff, Eugene Lamb Richards, as Superintendent of Banks, from so much of a judgment of the Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of New York on the 24th day of June, 1915, as dismisses the complaint upon the merits as against the defendants Louis I. Baron and others upon the decision of the court after a trial at the New York Special Term, and also from so much of the final judgment entered on the 25th day of September, 1915, as dismisses the complaint as to the defendant Louis I. Baron.

Appeal by the defendants, William R. Craig and others, from so much of the judgment entered in the office of the clerk of the county of New York on the 24th day of June, 1915, as adjudges that the plaintiff recover from them in this action.

David Hunter Miller, for the appellant Craig.

Jason G. Lamison, for the appellant Lauferty.

Theodore B. Richter, for the appellants H. Richter's Sons.

App. Div.]

First Department, June, 1917.

Joseph M. Hartfield, for the respondent McCabe.*Jacob W. Block*, for the respondent Baron.*Charles W. Lucas*, for the respondent Block.*Henry H. Abbott*, for the plaintiff as respondent.

SMITH, J.:

The Superintendent of Banks of the State of New York took possession of the Northern Bank of New York on December 27, 1910, and thereafter proceeded to liquidate its affairs as provided by section 19 of the former Banking Law (Cons. Laws, chap. 2 [Laws of 1909, chap. 10], as amd. by Laws of 1910, chap. 452). This action was subsequently commenced to enforce the statutory liability of the stockholders of the bank (See N. Y. Const. art. 8, § 7; former Banking Law, §§ 19, 71), and was originally brought against the stockholders of record only; but by a supplemental summons and complaint the transferees of certain shares were brought in as additional defendants. A number of the defendants paid assessments to the full amount of their stock during the pendency of the action, and judgment has been rendered to the full extent of their liability against the remaining defendants with the exception of a few, including the three respondents on plaintiff's appeal, as to whom the complaint was dismissed on the merits by reason of special circumstances to which — as far as material — reference will be made later.

The sole ground for reversal advanced by the appellant Craig — who concededly was a stockholder — is that the plaintiff failed to adduce competent proof to support the findings made by the trial court that the Northern Bank was insolvent at the time this action was brought or that its liabilities exceeded its assets by \$700,000 — the par value of its capital stock. And the same point is also made by the appellants Lauferty and H. Richter's Sons. To establish the assets of the Northern Bank at the time this action was commenced plaintiff introduced in evidence, over objection to its competency and exception, an inventory of assets verified by the then Superintendent of Banks and filed in the office of the clerk of the county of New York pursuant to the requirements of section 19 of the former Banking Law.

This inventory showed assets amounting, according to the bank's books, to \$7,073,598.91. Plaintiff then showed losses aggregating \$1,528,248.01 upon various items included in the inventory, and I do not understand that the appealing defendants now question seriously either the competency or sufficiency of the proof as to these losses. To prove part of the liabilities plaintiff relies on certain lists of claims aggregating \$5,463,172.72 filed with and not rejected by his predecessors in office, which lists were made and filed in the office of the clerk of the county of New York in accordance with the provisions of section 19 of the former Banking Law. These lists were offered and admitted as proof "that the claims were filed, not that the claims were valid." Orders of the Supreme Court directing the payment of dividends upon those claims were also admitted in evidence. As proof of further liabilities plaintiff relies on the testimony of one Horne, the Special Deputy Superintendent of Banks, who had charge of the liquidation of the Northern Bank, to the effect that the Superintendent of Banks had allowed offsets of \$800,000 against claims not included in the lists above mentioned and had paid in full preferred claims of \$121,000 not included in said lists. To summarize, the inventory of assets and lists of claims, together with the proof as to losses, offsets and preferred claims paid, shows an excess of liabilities over assets of upwards of \$800,000, a figure arrived at as follows: Claims filed with and not rejected by the

Superintendent of Banks.....	\$5,463,172 72
Offsets allowed by the Superintendent of Banks against claims not included in the lists of claims filed.....	800,000 00
Preferred claims paid but not included in the lists of claims filed.....	121,000 00
	<hr/>
	\$6,384,172 72
Book value of assets.....	\$7,073,598 91
Less ascertained losses.....	1,528,248 01
	<hr/>
	5,545,350 90
	<hr/>
Deficiency of assets.....	\$838,821 82

App. Div.]

First Department, June, 1917.

I am of opinion that this evidence was sufficient to establish *prima facie* the insolvency of the bank and an excess of liabilities over assets of more than the par value of the capital stock. It is clear that the trial court was right in holding that the inventory of assets and lists of claims were of the character of official public statements, prepared and filed in fulfillment of a duty imposed by law and open to public inspection. (See former Banking Law, § 19.) They accordingly come squarely within section 922 of the Code of Civil Procedure, which provides: "Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit, touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit, so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, * * *." It may be noted that this section incorporates into the Code a portion of the broader common-law rule that an official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent *prima facie* evidence as against all the world of such facts therein stated as the official was required or authorized by law to state (3 Wigm. Ev. § 1630 *et seq.*; *Saranac Land & Timber Co. v. Roberts*, 208 N. Y. 288, 299; *Board of Water Comrs. of Cohoes v. Lansing*, 45 id. 19; *People ex rel. Stone v. Minck*, 21 id. 539; *Evanston v. Gunn*, 99 U. S. 660; *Gaines v. Relf*, 12 How. [U. S.] 472, 570.) It is contended on behalf of the appealing defendants that because the lists of claims were received in evidence for the limited purpose of proving the filing but not the validity of such claims, they cannot be considered as even presumptive evidence of liabilities. But the proof of the filing makes *prima facie* proof of their verity. They are in the case. They are adequate *prima facie* proof of liabilities and may be regarded as such. Section 19 of the former Banking Law required the Superintendent of Banks to prepare and file lists of the claims presented "including and specifying such claims as have been rejected by him," and the express power to reject claims was given him by the same section. This by

clear implication placed upon him the duty of ascertaining which were valid and which were invalid claims. It is plain, therefore, that his act in returning lists of claims as not rejected is equivalent to an express allowance of such claims. Moreover, it is in evidence that dividends have been declared thereon by order of the court made on the application of the Superintendent, and such allowance, it seems, *prima facie* establishes their validity. The Superintendent of Banks is a statutory receiver (*Matter of Union Bank*, 204 N. Y. 313, 317) and is in effect a receiver of moneyed corporations. (*Cheney v. Scharmann*, 145 App. Div. 456, 470.) As such, his powers include the same power to allow or reject claims as is given to executors (Gen. Corp. Law [Consol. Laws, chap. 23; Laws of 1909, chap. 28], §§ 156, 161) whose allowance of claims is *prima facie* proof of their validity. (*Matter of Warrin*, 56 App. Div. 414.) The assets and liabilities thus claimed by him would, therefore, seem to have been *prima facie* established.

The appellant Lauferty makes further objection that the plaintiff is estopped from recovering judgment against him because of the following facts: In the original complaint Lauferty was sued as the owner and holder of record of eleven shares of stock. After he had answered denying that he was a stockholder, the plaintiff served a supplemental summons and complaint joining as defendants individuals to whom various record holders claimed to have transferred their stock and alleging *inter alia* that with respect to 309 certain shares standing on the books of the bank in the names of other defendants, the defendant firm of Battles & Co. "purchased and became the actual owners" thereof and are "the transferees" thereof and liable to assessment thereon, and further that the defendant Morris "purchased and became the actual owner" of 309 certain shares standing in the names of other defendants and "is the transferee" thereof and liable to assessment thereon, and further that the defendant Robin "purchased and became the actual owner" of 636 certain shares standing in the names of other defendants and "is the transferee" thereof and liable to assessment thereon. Two members of the firm of Battles & Co. answered and Lauferty then filed an amended answer alleging that he had sold his stock at auction to Battles & Co. and asking affirmative

App. Div.]

First Department, June, 1917.

judgment to the effect that Battles & Co. save him harmless from plaintiff's claim against him. It appeared on the trial that Battles & Co. had bought Lauferty's stock as brokers for Morris and that the certificate representing that stock had been in the possession of the Superintendent of Banks since December, 1910, having prior thereto been taken over in connection with the liquidation of the Carnegie Trust Company which held it as collateral for an indebtedness of the defendant Robin. Lauferty's claim is that he was misled by the allegations in the supplemental complaint, made at a time when plaintiff was in possession of Lauferty's certificate and knew that Robin was the owner of the stock represented thereby, into seeking affirmative relief against Battles & Co. only, and hence that plaintiff is estopped from recovering judgment against him. It is clear that the contention is without merit. In the first place, it is hard to see how Lauferty could have been misled by the allegations of the supplemental complaint which does not identify his stock as among that sold to or held by Battles & Co., Morris or Robin. But if it did so identify it, Lauferty would be in no better position, for plaintiff was at perfect liberty to bring in as defendants both the record holder and the transferees of the stock, for both the record holder and the actual owner were liable (former Banking Law [Consol. Laws, chap. 2; Laws of 1909, chap. 10], § 2, as amd. by Laws of 1910, chap. 126; *Van Tuyl v. Robin*, 160 App. Div. 41; *affd.*, 211 N. Y. 540), and he was at equal liberty then to proceed to judgment against the record holder only (*Wheeler v. Werner*, 140 App. Div. 695); indeed this procedure made it possible for Lauferty to seek such affirmative relief by way of exoneration as he might be entitled to against any or all of the transferees. He did pursue Battles & Co. and appealed from that portion of the judgment refusing him relief against them, but later procured the dismissal of that part of his appeal. There is nothing in the supplemental complaint which justified him in supposing that plaintiff asserted Battles & Co., rather than Morris or Robin, to be the actual owner of the stock. Furthermore, the fact that plaintiff knew that Robin was the actual owner of the stock is not established by the record, and if it were, it would not affect plaintiff's right to pursue

and recover from Lauferty as the record holder. (*Wheeler v. Werner, supra.*)

The facts peculiar to the appeal of H. Richter's Sons are as follows: The members of this firm owned fifty shares of the stock of the "old" Northern Bank when in June, 1908, that bank, the Riverside Bank and the Hamilton Bank were merged into a single institution called the Hamilton Bank of New York, which subsequently changed its name to the Northern Bank of New York. The trial court has found that H. Richter's Sons did not have lawful notice or knowledge of the merger and that as to them it was, therefore, invalid and ineffectual; but has nevertheless held them liable as holders of fifty-five shares of stock in the "new" Northern Bank on the theory, as appears from the opinion, that they were estopped by long acquiescence from questioning the merger. Neither the findings nor the evidence justify such a conclusion. In addition to the findings as to lack of notice and knowledge, there are others to the effect that H. Richter's Sons never gave up their certificate of stock in the "old" Northern Bank or received a certificate of stock in the "new" Northern Bank, or participated in or had knowledge of the conduct of the business of either of them, or ever stated to any one that they were stockholders in the "new" Northern Bank; and it appears by uncontradicted evidence that they did not learn of the merger until "probably about a year" after it took place — approximately eighteen months prior to the taking over of the Northern Bank by the Superintendent of Banks. Even though H. Richter's Sons were carried on the books of the "new" Northern Bank as stockholders, it is clear that they were not stockholders in fact, for their consent, express or implied, was necessary to the creation of the relation (*Glenn v. Garth*, 133 N. Y. 18, 44), and while doubtless they might have waived the invalidity of the merger, I am of opinion that the facts proved fail to establish either express or implied consent, waiver or estoppel.

Plaintiff appeals from so much of the judgment as dismisses the complaint on the merits as against the defendants McCabe, Baron and Block. At the time of the closing of the Northern Bank, McCabe appeared upon its books as the owner and holder of thirty shares of its stock, which had been put in

App. Div.]

First Department, June, 1917.

his name for the convenience of his employer, the Bankers' Trust Company, which held them as collateral security. Twenty of these shares had in fact been transferred previously to Baron and will be hereafter discussed. Ten shares, however, had been transferred to Battles & Co. The transfer was not recorded and it does not appear that any attempt whatever was made by any one to register this transfer on the books of the bank. Upon those ten shares, therefore, McCabe was liable to assessment. (*Van Tuyl v. Robin, supra.*)

Baron, at the time he bought the twenty shares standing in McCabe's name, was the owner of fifty other shares and he still appeared as the record holder thereof when the bank closed. Prior to the latter date he sold all seventy shares to Robin, who was a director, and according to Baron's testimony, which was not objected to, an officer of the Northern Bank. Subsequently he went to the Broadway branch of the bank to ascertain whether the transfer had been registered on the books. He saw Robin and the manager and assistant manager of the branch, and Robin directed the latter to make inquiry by telephone at the main office, where apparently the stock book was kept. The testimony is that the assistant manager did so and reported as a result of the telephone conversation that the stock had been transferred. It is manifest that Baron did all that could reasonably be required of him to effect the transfer and that by so doing he relieved himself from liability as a stockholder (*Whitney v. Butler*, 118 U. S. 655), and I see no reason why his acts should not operate to release McCabe likewise as to the twenty shares Baron purchased from him. The plaintiff claims that Baron referred only to the fifty shares standing in his own name when he made his inquiry, but that is, I think, too narrow a construction of the evidence.

The conclusion reached as to Baron applies with equal force to the defendant Block. Robin purchased his stock some three months prior to the closing of the bank, told his attorney that it would be transferred on the books and a few days later in answer to the attorney's inquiry assured him that the transfer had in fact been made.

It follows that the judgment so far as appealed from by the defendants H. Richter's Sons should be reversed and the complaint and supplemental complaint dismissed as to them;

that upon the appeal of the plaintiff the judgment should be reversed in so far as it dismisses the complaint and supplemental complaint as against the defendant McCabe, and that judgment should be entered against him as a holder of ten shares of stock. In all other respects the judgment is affirmed. Finding of fact numbered twelve should be modified by striking out the names of the members of the firm of H. Richter's Sons; and finding of fact numbered forty-one should be modified (with reference to McCabe) in accordance with opinion. The plaintiff is entitled to costs against the defendants Craig, Lauferty and McCabe, and the defendants H. Richter's Sons, Baron and Block are entitled to costs against the plaintiff. The expenses of printing the record will be paid by plaintiff out of the fund in his hands.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

On defendants Richter's appeal, judgment reversed and complaints dismissed as to them; on plaintiff's appeal, judgment reversed as to defendant McCabe, and judgment ordered as directed in opinion. In all other respects judgment affirmed. Plaintiff awarded costs against defendants Craig, Lauferty and McCabe; and defendants H. Richter's Sons, Baron and Block awarded costs against plaintiff. The expense of printing record to be paid by plaintiff out of fund in his hands. Order to be settled on notice.

In the Matter of the Judicial Settlement of the Account of JACOB B. TOCH and FERDINAND R. MINRATH, as Executors of and Trustees under the Last Will and Testament of ROBERT F. AMEND, Deceased.

GERTRUDE L. AMEND, Appellant; CARL G. AMEND and Others, Respondents.

First Department, June 8, 1917.

Will construed — gift of stock of private corporation in trust for purpose of perpetuating family control — trust period limited to two lives — trust valid.

A will stated in substance that the testator and his brother owned the "controlling interest" in the stock of a business corporation, and that, whereas the testator and his brother had agreed, so long as they owned

App. Div.]

First Department, June, 1917.

such controlling interest, to hold and use the same for their mutual benefit and for the control of the corporation, and as they had agreed not to sell their holdings separately, except to one another, the testator directed his executors to reserve said stock which he gave to them in trust so long as his brother held the stock now owned by him, and directed the executors to vote on said stock in conjunction with said brother for the joint benefit of the estate, and not to sell or dispose of the shares except to said brother, or with his consent, unless or until the said brother should sell the stock now owned by him, subject to the prior termination of the reservation by the death of the testator's wife and daughter. By subsequent clauses the trust was to end on the death of the testator's wife and daughter, while the reservation as to the sale or disposition of the stock was to terminate upon the happening of either of two conditions, *first*, the sale by the testator's brother of his stock, and *second*, the death of the testator's wife and daughter, when the trust was to terminate and the proceeds be distributed.

Held, that the trust, being limited to the duration of two lives in being was valid.

As the clearly expressed intention of the testator, as shown by his will and other evidence, was to preserve the family control over the corporation, the stock of which was held only by members of the family, and which was in effect a "close corporation," the court will not read into said will, as a condition for the continuance of the trust, a requirement that at the testator's death his brother had not disposed of any stock held by him when the will was made, and hence it is immaterial that said brother transferred certain shares of his stock to his wife, or that the testator had also transferred stock to the same person for the purpose of protecting the same upon a threatened insolvency.

Nor did the provision of said will mean that the testator and his brother must own a majority of the stock of the corporation at the time of the testator's death, for the term "controlling interest" did not necessarily mean a majority holding, but merely a holding of sufficient stock to control the management of the corporation.

APPEAL by Gertrude L. Amend from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 12th day of December, 1916, adjudging that the trust contained in the fourth paragraph of the will of said deceased is valid and effective and also directing the executors to transfer to themselves as trustees certain stock.

Henry Siegrist, for the appellant.

Lee McCanniss, for the respondents.

APP. DIV.—VOL. CLXXVIII. 35

SHEARN, J.:

The testator and his brother Otto P. owned in May, 1913, when the will was executed, a controlling interest in the stock of Eimer & Amend, a corporation. The testimony shows that Eimer & Amend, of which the testator was a director and treasurer and his brother Otto P. a director and vice-president, was a close corporation; and its entire capital stock, 1,000 shares, was issued and outstanding at the time of the execution of the will. The Amend family, consisting of the testator, his brother Otto P., Elenore Amend, wife of Otto P., and Carl G. Amend, held together $635\frac{2}{3}$ shares, distributed as follows: Robert F. Amend, $315\frac{1}{3}$; Otto P. Amend, $140\frac{1}{3}$; Elenore Amend, 100; Carl G. Amend, 80 — the testator and Otto P. Amend holding together $455\frac{2}{3}$ shares. The Eimers held $320\frac{1}{3}$ shares. In October, 1909, the testator and Otto P. Amend entered into an agreement reciting their ownership of a large amount of the stock and their expectation to acquire a controlling interest in the corporation and providing that for the period of twenty years they would keep the management of the corporation in their joint control and refrain from selling their stock without first offering it to the other. At the time of the death of the testator, January 6, 1914, the holdings of stock were: Robert F. Amend, 150; Otto P. Amend, 20; Elenore Amend, $385\frac{2}{3}$; Carl Amend, 80; total, $635\frac{2}{3}$, which was the same total that these four held collectively at the date of the execution of the will. The Eimers held the same amount as at the execution of the will. The Amend family always voted its stock together and whatever changes took place in the ownership of the stock of the Amends were among themselves, none being sold to strangers. When the testator and his brother had become so heavily involved financially in certain business ventures that all the stock of Eimer & Amend owned by them was pledged as security for their debts and in imminent danger of being sold out, Elenore Amend, the wife of the testator's brother Otto P., came to their aid, and the testator, as shown by an agreement of October 3, 1913, sold to her 210 shares of his stock and she paid the debts secured thereby. Control of the corporation was thus kept in the Amend family and the testator continued to draw a yearly salary of \$21,000.

App. Div.]

First Department, June, 1917.

The fourth paragraph of the will is as follows:

"*Fourth.* Whereas, I and my brother, Otto P. Amend, now own a controlling interest in the stock of Eimer & Amend; and, whereas, I will in all probability at the time of my death, in conjunction with my brother, Otto P. Amend, own a controlling interest in the said corporation of Eimer & Amend, or in the stock of said corporation; and whereas, I and my brother, Otto P. Amend have agreed, as long as we own such controlling interest in said stock, to hold and use the same for our mutual benefit and for the control of said corporation, and have agreed moreover not to sell our holdings separately, I herewith direct my Executors to reserve all of such stock, and I give the same to my Executors, in trust, nevertheless, to continue to hold such stock at such valuations as my said Executors and Trustees may deem proper so long as my brother Otto P. Amend may hold all of the stock now held by him, and to vote thereon in conjunction with my brother Otto P. Amend, or his legal representatives, for the joint benefit of my brother and my estate, and not to sell or dispose of such shares except to my brother or with his consent, unless and until my said brother shall sell and dispose of the stock now owned by him, and subject to the prior termination of this reservation by the prior death of my wife and my daughter; to pay one-half the income of said fund, from time to time, to my wife for the period of her life, and after her death, (if my daughter be then living) to my daughter for the period of her life, to pay the other half of such income to my daughter for the period of her life, and if she dies before my wife leaving descendants, then to pay the said one-half of the income to her children and the descendants of any deceased child *per stirpes* for the period of the life of my wife, and if she dies before my wife without issue, to pay such entire income to my wife for life, and upon the death of both my wife and my daughter then to sell such stock (preferably to my brother, Otto P. Amend) and to divide the principal of such trust, and all undistributed income thereon, between the then living children of my daughter, and the issue of any deceased child or children of my daughter, *per stirpes*, and in case of the death of my daughter without issue, I give such trust fund, or the proceeds thereof, after the termination of said

two life estates, to my brother Otto P. Amend, if living, and, if dead, to his children, and the issue of any deceased child or children of his *per stirpes*."

The fact that the testator and his brother Otto P. prior to the testator's death had transferred the bulk of their holdings to the wife of Otto P. is made the basis of an attack upon the validity and effectiveness of this trust, the contention being that there should be read into it a condition unexpressed that the trust only became effective in the event (1) that at the time of the testator's death his brother Otto P. had not disposed of any of the stock held by him when the testator made his will, and (2) in the event that the testator and his brother owned at the time of testator's death a controlling interest in the stock of the company. The trust is a perfectly valid one and is clearly expressed. The testator gives whatever Eimer & Amend stock he may have at the time of his death to his executors in trust for his wife and daughter for their lives with remainder over to his daughter's children, if any, and if none, to his brother, or, if dead, to his children. The trust "res" is specified. It is to be held for two lives in being. The trustees are designated, and the trust is a lawful one. The testator specifically makes clear his wish and intention that the Eimer & Amend stock owned by him at the time of his death be "reserved," or, as he explains, held in specie so long as his trustees and his brother own a controlling interest. It is quite apparent that for all practical purposes the control of the corporation in the hands of the testator and his brother Otto P. was just as effective when the bulk of their holdings was transferred to the wife of one of them as it was before. There is no suggestion of any disagreement between the wife and her husband or between the wife and her brother-in-law, and the fact that the testator continued to draw his salary of \$21,000 a year after the transfer is significant as indicating that the control of the corporation after the transfer was for all practical purposes where it was before. The same reason that impelled the testator and his brother to agree in 1909 not to sell their stock without offering it first to the other applied in full force after lodging the bulk of their stock in the hands of Otto's wife. The plain purpose of it all was to preserve the predominating influence of the Amend family

App. Div.]

First Department, June, 1917.

in this family corporation. To read into this trust the unexpressed condition that it was only to become effective in the event that on the death of the testator Otto P. Amend held all of the shares that he held when the will was made, and that the transfer of some of his shares to his wife, without disturbing the control, rendered the trust ineffective, would run counter to the scheme and intention of the will, which was to carry out in good faith, so far as could be legally done, the original agreement of 1909, which in turn has for its purpose the preservation of the Amend family control in the company. There are no conditions, either precedent or subsequent, expressed in this paragraph of the will, and not only are courts loath to read unexpressed conditions into grants or devises, but to do so in this case would make a new will and frustrate the testator's clearly expressed purpose.

It is also claimed that the trust is ineffective because the testator and his brother did not own a majority of the 1,000 shares of the stock of the company either at the time the will was made or at the time of the testator's death, and, therefore, they did not have a controlling interest. It is well understood that a controlling interest in a corporation may be less than a bare majority. If the testator had meant majority he would probably have used that expression, but when it is considered that he knew just how many shares both he and his brother held when he made the will, and that this number was sufficient to enable them, as a practical matter, to control the corporation, it is quite apparent that the expression "controlling interest" was employed in the ordinary sense and not to describe a state of facts contrary to what the testator knew them to be.

A careful reading of the fourth paragraph further shows that the testator distinguished between the *trust* that he created and the *reservation* that the trustees were to make of the stock. There is only one provision for terminating the trust, *i. e.*, the death of the testator's wife and daughter. There are two provisions for terminating the reservation of the stock — *first*, the sale by the testator's brother of his stock, and *second*, the death of the testator's wife and daughter, when the trust is to terminate and the stock is to be sold.

First Department, June, 1917.

[Vol. 178.]

The decree of the surrogate should be affirmed, with costs to the respondents payable out of the estate.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Decree affirmed, with costs to respondents payable out of the estate.

WILLIAM M. O'CONNOR, Appellant, v. THE CITY OF NEW YORK, Respondent.

First Department, June 8, 1917.

Municipal corporations — police officers, city of New York — increased salary after promotion dates from anniversary of appointment for probationary service — action by police officer to recover balance due — limitation of action — New York charter, section 302, construed — defenses — acceptance of salary — accord and satisfaction — mandamus not prerequisite to action — failure of civil service commission to certify patrolman's name.

When section 284 of the charter of the city of New York was amended by chapter 278 of the Laws of 1907, providing that service on the police force of said city during the period of probation under the rules of the municipal civil service commission shall be deemed to be service in the uniformed force if succeeded by a permanent appointment, the advancement of a patrolman who has been appointed permanently after serving his period of probation should occur each year on the anniversary or semi-anniversary of his probationary appointment, and not on the anniversary or semi-anniversary of his permanent appointment.

Hence such patrolman, having been successively promoted, was entitled automatically to the increase of salary on the anniversaries of the date of his probationary appointment; and where by error his increased salaries have been paid only from the later anniversaries, he is entitled to recover the difference from the city.

The two years' Statute of Limitations contained in section 302 of the city charter does not relate to such action, but, on the contrary, relates only to suits by police officers concerning disciplinary fines and punishments. The six years' Statute of Limitations is the only statute affecting said action.

The plaintiff, by accepting his salary under the erroneous ruling that the increase was to date from the anniversaries of his permanent appointment, did not waive his claim against the city for the balance legally due.

Nor did the acceptance of said salary amount to an accord and satisfaction. It is no defense to said action that the plaintiff did not invoke the writ of mandamus to compel the police commissioner to place his name on the payroll at the proper rate.

App. Div.]

First Department, June, 1917.

Nor is it a defense that the civil service commission never certified any list containing the plaintiff's name, for the fact that the plaintiff was regularly advanced by the police commissioner, after examination for promotion, establishes his efficiency and good conduct.

Nor is it a defense that no appropriation was made to pay the compensation of the plaintiff at the legal rate, as he was entitled thereto by the specific terms of the statute.

APPEAL by the plaintiff, William M. O'Connor, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of March, 1916, denying his motion for judgment on the pleadings consisting of a complaint and the answer thereto.

Alfred J. Talley, for the appellant.

John F. O'Brien, for the respondent.

SHEARN, J.:

Plaintiff is a patrolman in the police department of the city of New York. After qualifying in competitive examination, he was duly appointed to said position on the 28th day of February, 1907. Since that date he has continued in the department in the same capacity. Rule XI, subdivision 2, of the rules and regulations of the municipal civil service commission of the city of New York, as in force at the time of plaintiff's appointment, provided for a probationary period of one month for appointees to the police department. On March 27, 1907, at the expiration of his one month probationary period, plaintiff was duly appointed permanently as a uniformed patrolman in the seventh grade. By section 299 of the charter (Laws of 1901, chap. 466, as amd. by Laws of 1905, chap. 637, and Laws of 1907, chap. 160) patrolmen are divided as to salary into seven grades, the minimum salary being \$800 for the seventh grade and the maximum salary being \$1,400 for the first grade. Plaintiff was advanced in grade each year following his appointment on the anniversary or semi-anniversary of his permanent appointment until on March 27, 1912, he attained his maximum salary, \$1,400 per annum. On May 4, 1907, chapter 278 of the Laws of 1907 became effective, amending section 284 of the charter, and

providing that service during probation shall be deemed to be service in the uniformed force, if succeeded by a permanent appointment, "and as such shall be included and counted in determining eligibility for advancement, promotion, retirement and pension." Plaintiff correctly claims that pursuant to this act of 1907 his advancement in salary should have occurred each year on the anniversary or semi-anniversary of his probationary appointment. By reason of either a mistake in the interpretation of the law or inadvertence, the plaintiff's salary was not advanced in accordance with sections 284 and 299 of the charter, and plaintiff claims that he is entitled to the sum of fifty dollars, with interest, because each annual or semi-annual increase was withheld for one month by defendant each year for five years following plaintiff's probationary appointment. Plaintiff filed a notice of claim and intention to sue on October 22, 1914, and instituted this action on December 31, 1914. The city answered, setting up seven separate defenses and two separate and partial defenses. One of the complete defenses was the two-year Statute of Limitations contained in section 302 of the charter. Upon plaintiff's motion for judgment on the pleadings, the learned justice at Special Term, without passing upon the other defenses, held that the action is barred by section 302 of the charter.

So far as pertinent to the present action, the provisions of section 302, upon which defendant relies, are:

"Police commissioner; punishments by; limitations of suits for reinstatements, etc. § 302. * * *

"No action, suit or proceeding, either at law or in equity, shall be commenced or maintained against the police department, or any member thereof, or against the police commissioner, or against the mayor, or against The city of New York, by any member or officer, or former member or officer of or belonging to the police force or department of said city to recover or compel the payment of any salary, pay, money or compensation for or on account of any service or duty, or to recover any salary, compensation or moneys, or any part thereof forfeited, deducted or withheld for any cause, unless such action, suit or proceedings shall be commenced within two years after the cause of action shall have accrued; provided that causes of action or proceedings which shall have

App. Div.]

First Department, June, 1917.

heretofore accrued may be begun or brought within six years after the same shall have accrued and within two years after the passage of this act; but nothing in this section contained shall be construed or held to extend the time in which causes of action or proceedings which shall have heretofore accrued must be brought, and no proceeding shall be brought to procure the restoration or reinstatement to said police force or department of any member or officer thereof, unless said proceeding shall be instituted within four months after the decision or order sought to be reviewed."

On behalf of the city it is contended that the statute prescribes two classes of claims barred by the term of years designated therein: (1) "Salary, pay, money or compensation for or on account of any service or duty," and (2) "Salary, compensation or moneys, or any part thereof forfeited, deducted or withheld for any cause." Reading these words quoted from the statute, without consideration of the context and without considering the history of the section or decisions construing and applying other parts of the section, the contention of the city would appear to be well founded. It is said that all that it is necessary to do is to hold that the statute means just "what it says." Unfortunately, owing in part to the fact that the charter in its present form is more or less of a patchwork, made up of excerpts from the old Consolidation Act, changes proposed by the commissioners and frequent amending acts, it is not always possible to work out justice by applying a rule of literal construction. "It is a familiar rule that a construction of a statute is to be avoided which is liable to produce a public mischief or to promote injustice. Language, however strong, must yield to what appears to be the intention, and that is to be found, not in the words of the particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part." (*Hayden v. Pierce*, 144 N. Y. 512, 516.) Plaintiff is suing to recover certain increments of salary which have been earned and which should have been paid to him and would have been paid to him but for a mistake as to the law or an inadvertent omission, which mistake or omission was not made by the plaintiff but was made by the defendant. The money sued for was never forfeited for any cause; neither was

it ever deducted or withheld for any cause. A manifest injustice has been done to the plaintiff and it remains to be seen whether the statute must be interpreted so as to perpetuate injustice. That all of the limitations in this section are not to be strictly construed as they literally read has been decided by the Court of Appeals. For example, when the portion of the statute under consideration was incorporated in the charter of 1901 there was inserted a provision that "No proceeding shall be brought to procure the restoration or reinstatement to said police force or department of any member or officer thereof, unless said proceeding shall be instituted within four months after the decision or order sought to be reviewed." Where a member of the police force who had been retired on account of physical incapacity desired to bring a proceeding for reinstatement, his case would fall within the literal terms of the statute just quoted, yet it was held in *People ex rel. Hurlbut v. Bingham* (186 N. Y. 538) that the four months' limitation "does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity." The only conceivable ground for so holding must have been the obvious one that this limitation was found in a statute having to do exclusively with disciplinary proceedings and could never have been intended to apply to the case of an officer retired on account of physical incapacity. (See, also, *People ex rel. Tims v. Bingham*, 166 N. Y. Supp. 28, opinion by CLINCH, J.) In the city's brief, filed in the Court of Appeals in the *Hurlbut* case, reference was made to the reasoning of the court in the *Tims* case, and it was stated: "Similar reasoning would restrict the application of the provisions limiting the time to recover back salary to two years to such cases [disciplinary proceedings] although the language 'excludes money withheld for any cause.'" Thus the corporation counsel correctly apprehended that an affirmance of the *Hurlbut* case on the reasoning of the *Tims* case would have the force that is herein given to the *Hurlbut* decision.

The title of section 302 is "Police commissioner; punishments by; limitations of suits for reinstatements, etc." The whole of the long section deals with disciplinary fines and punishments. The title of an act defines its scope and its

valid provisions are limited to those within the range of the subjects stated in the title. The abbreviation "etc.," in that part of the title reading "limitations of suits for reinstatements, etc.," is significant, and under a familiar rule of statutory construction must refer generally to things the same in kind as those particularly specified. The part of section 302 immediately preceding the limitation clause reading "to recover or compel the payment of any salary, pay, money or compensation for or on account of any service or duty; or to recover any salary, compensation or moneys, or any part thereof forfeited, deducted or withheld for any cause," refers to fines, forfeitures and deductions because of violations of the rules of the police department or because of absence without leave, and all other parts of the section refer to forfeitures, deductions and withholding of salary for cause, the cause in every case being dereliction of duty or absence without leave. This two-year limitation appeared for the first time in the Laws of 1884, chapter 180, section 7, which was an amendment to the Laws of 1882, chapter 410, section 272 (New York Consolidation Act), and had to do only with cases of reinstatement to the police force. Section 272 of chapter 410 of the Laws of 1882 bears, as a marginal note in the official edition, the following: "Dismissals, etc., from police force." Section 7 of chapter 180 of the Laws of 1884, which amended section 272 of chapter 410 of the Laws of 1882 (Consolidation Act), contains provisions identical with those found in section 302 of the charter under consideration. The following marginal notes appear in the official edition of the Session Laws of 1884 by the side of section 7 of chapter 180: "On conviction, member of force may be suspended, etc." "Salary may be withheld in case of sickness, etc." "Within what time actions may be brought."

In *People ex rel. Bierach v. York* (36 App. Div. 185) it was held that the provisions of section 302 of the charter (Laws of 1897, chap. 378) are in effect and substance the same as those of section 272 of the Consolidation Act and that the charter did not work any repeal of that section of the Consolidation Act, and that provisions relating to proceedings against the police or city authorities by members of the force or former members of the force were not changed thereby.

Section 1608 of the charter provides that so far as the provisions of the charter are the same in terms or in substance and effect as the provisions of the Consolidation Act the charter is intended to be not a new enactment but a continuation of the Consolidation Act and shall be so construed. (See, also, Laws of 1901, chap. 466, § 1608.) When this two-year limitation first appeared in the act of 1884 it applied to reinstatements as well as to actions for back pay or pay withheld. Inasmuch as it was held by the Court of Appeals, when this particular limitation was changed to four months, that it referred only to reinstatements after discipline, it follows that the two-year limitation, applied to reinstatements in the act of 1884, referred only to reinstatements after discipline. In other words, the limitations on the commencement of actions, found in the act of 1884 and carried forward, did not apply to all actions, and as the Court of Appeals has confined the limitation as to reinstatements to cases where the plaintiff has been disciplined, it would seem to be entirely consonant with this decision, as well as in harmony with the history of the statute, to make the same exception to all of the other limitations in the section, and apply the same only where pay has been forfeited or withheld for cause. Such an interpretation is fortified by the consideration that it tends to prevent a plain injustice. There is a good reason why there should be a short limitation in actions involving any review of disciplinary procedure in the police department, but there is no reason whatever why the ordinary rule of limitations governing actions on contract should not apply in the case of a policeman suing for salary earned but which the city has failed to pay without any fault on his part and as a result of its own mistake of law or inadvertence. It follows that the first and second separate defenses are insufficient, and in so far as the decision of the learned Special Term is based upon them it should not be sustained.

The third and fourth separate and partial defenses plead the six-year Statute of Limitations. These defenses are good as applying to the increment of salary which plaintiff was entitled to receive in the month of March, 1908, amounting to eight dollars and thirty-three cents.

The fifth defense is that plaintiff accepted his salary for

App. Div.]

First Department, June, 1917.

the period involved and by so doing waived all claims against the defendant. This defense is insufficient. (*Moore v. Board of Education*, 121 App. Div. 862; *affd.*, 195 N. Y. 614.)

The sixth defense is accord and satisfaction, but it must be, and evidently is, conceded by the city that the facts afford no basis for any such defense.

The seventh defense is plaintiff's failure to mandamus the police commissioner to place his name on the payroll at the proper rate, which defense may be considered together with the eighth, setting forth that the civil service commission has never certified any list containing plaintiff's name. Plaintiff contends that the advance is automatic and relies on *Lowery v. City of New York* (166 N. Y. Supp. 400), GREENBAUM, J., holding that section 740 of the charter, providing for a similar advancement of firemen, acted automatically. (See Laws of 1901, chap. 466; § 740, as *amd.* by Laws of 1912, chap. 328.) That case is inapplicable because there does not appear to be any provision requiring an examination of firemen before advance in grade such as is required by section 299 of the charter for patrolmen. The defense, however, is insufficient, because the fact that the police commissioner did regularly advance the plaintiff from grade to grade shows that his record, efficiency and conduct had been approved by the police commissioner, but that a mere mistake was made in excluding the probation month from the reckoning to fix the rate of pay. When plaintiff was advanced from time to time after examination and approval of his record, efficiency and conduct by the police commissioner, the legal rate of pay to which plaintiff was entitled had his term of service been properly reckoned became fixed automatically and plaintiff did not lose his right of action by failure to resort to mandamus.

The ninth defense alleges that no appropriation was made to pay the compensation of the plaintiff at the rate which he claims he was entitled to be paid. This does not constitute any defense where the statute specifically fixes the salary. (*People ex rel. Fiske v. Woods*, 173 App. Div. 355.)

It follows, therefore, that but for the bar of the six-year statute to the increment of salary accruing in March, 1908, plaintiff was entitled to judgment. Nevertheless, as there is a sufficient partial defense interposed, plaintiff's motion

for judgment could not be granted on a complaint embracing an item that accrued in March, 1908. Accordingly the order must be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of MAX BROWN, an Attorney, Respondent.

First Department, June 15, 1917.

Attorney at law disbarred — gross unprofessional conduct — making false affidavit — refusing to pay over money due to receiver and converting same — making false statement of fact to receiver — violation of written stipulation.

Attorney at law disbarred for gross professional misconduct which consisted, *first*, in making a false affidavit with intent to deceive the court; *second*, by improper collection of rents due to a receiver, by refusing and neglecting to pay the same over on demand and by converting a large part thereof to his own use; *third*, in making a false statement in his letter to the receiver that the court had made him a certain allowance; and *fourth*, for violating a written stipulation not to take an appeal.

The possessory lien of an attorney at law assumed the *res* to be in his possession. The existence of such lien does not entitle the lienor to use the property subject thereto, and if an attorney uses money in his possession, on which he claims a lien, he is guilty of a conversion.

A stipulation not to take an appeal is binding.

DISCIPLINARY PROCEEDINGS instituted by the County Lawyers Association.

Mason Trowbridge [*George R. Adams* of counsel], for the petitioner.

Max Brown [*Elias Rosenthal* of counsel], respondent in person.

CLARKE, P. J.:

The respondent was admitted to the bar in May, 1898. The original petition contained three specifications of misconduct, which were referred by this court to one of the official referees to take and state the evidence in respect thereto

App. Div.]

First Department, June, 1917.

with his opinion thereon. Thereafter the official referee filed his report, with his opinion that the charges should be dismissed, omitting, however, a statement of the evidence upon which such opinion was based. Concurrent with a motion by the respondent for an order confirming the report, the petitioner moved for an order recommitting all the papers and proceedings to the official referee and directing him to file a further report in accordance with the order of reference. The petitioner subsequently moved to amend the petition by the addition of four specifications and that the same be referred to the official referee. The court denied the respondent's motion to confirm the report of the official referee, and granted the motion of the petitioner to recommit the proceeding to take the testimony in regard to the additional charges and to report the same, together with the evidence as to the original charges, with his opinion thereof. After the close of the evidence taken on the additional charges, both the petitioner and respondent, at the suggestion of the official referee, submitted proposed reports embodying statements of the evidence and their respective conclusions thereon. The official referee has adopted as his report to this court the proposed report submitted by the respondent, which finds both the original and additional charges not sustained, and recommends that the same be dismissed.

We shall consider in this opinion only the additional charges.

The fourth specification charges that the respondent, on or about November 16, 1915, knowingly made and submitted to a justice of the Supreme Court a certain false affidavit upon a motion to set aside a judgment theretofore rendered in the said court, for the purpose of deceiving the said justice and of obtaining an order to show cause why the said motion should not be granted. The portion of the affidavit to which the charge is directed is as follows: "The matter came on before Peter B. Olney, Esq., Referee named by the plaintiff's attorney, and after the defendant had testified, and defendant's witness, Charles Veschler, had testified and who said he had examined the books and found irregularities and a difference of about \$7,000, and also pointed out the losses and the double charges made to defendant; then the case was adjourned for the purpose of producing another witness,

to wit, the bookkeeper, for the purpose of identifying the entries made in the books, and in the meantime vacation came on, and the matter was adjourned by all parties including the referee."

The judgment sought to be vacated was rendered in the matter of *Blitzer v. Veschler*, an action in the Supreme Court to recover the balance alleged to be due upon an accounting after the dissolution of a copartnership. The defense was fraud and an incorrect statement of the account by reason of certain entries in the copartnership books. The matter was referred to Referee Peter B. Olney, before whom the issues were tried, resulting in a judgment in favor of the plaintiff. A transcript of the testimony of the defendant's witness Veschler before the referee discloses that he did not testify to the facts stated in the respondent's affidavit. The respondent concedes that Veschler did not so *testify*. He claims, however, that Veschler stated the facts in question to the referee in a *private conversation*, and that this is the effect of the statement in the affidavit, properly construed. I find nothing in the language of the affidavit justifying the strained construction asserted by the respondent. The language is susceptible of but one reasonable construction, namely, that Veschler testified on the hearing that he had examined the books and found irregularities and a difference of about \$7,000, pointing out losses and double charges made to the defendant. If the respondent had wished to indicate otherwise, it would have been an easy matter to have so expressed himself in unmistakable terms.

Assuming, however, that the language is susceptible of the construction advanced by the respondent, the preponderance of the evidence establishes that no such conversation as is alleged between the witness Veschler and the referee ever took place. In respect to this alleged conversation, the respondent testified that after objection had been raised to the admission of the book entries on the ground that they had not been properly identified, the referee left his seat and went over to the witness Veschler, stating to the witness that he wanted to know for his own information about the amount of the discrepancies claimed by the defendant, and asking that such discrepancies be pointed out to him on the

App. Div.]

First Department, June, 1917.

books; that the witness stated that the difference was about \$7,000, and pointed out several items in the books. The respondent was corroborated by the witness Veschler and by one Lewittes, who occupied desk room in the respondent's office, both of whom testified, in addition, that the referee suggested that the litigants meet at the office of the plaintiffs' attorneys to discuss their differences.

For the petitioner, Parkus, the stenographer in attendance at the hearing, testified that the stenographic minutes contained a complete and accurate record of all the testimony adduced at the hearing in question, and that his best recollection was that no such conversation was had "off record." Referee Olney testified that the case was somewhat fixed in his memory by reason of two certain incidents which occurred, and that to his best recollection he had no conversation with the witness Veschler not reported in the record; nor had he any recollection of leaving his seat and asking the witness to point out discrepancies in the books. Both Henry H. Bowman and Harold H. Bowman, of the firm of Smith & Bowman, the plaintiff's attorneys, testified positively that no such conversation occurred. The former further testified that after the hearing was adjourned he suggested a meeting at his office to enable the defendant to point out any *bona fide* errors found in the books, and such meeting was arranged, the referee taking no part in the conversation.

The learned official referee, in adopting the proposed report submitted by the respondent, has found not only that the petitioner's complaint under this specification was based upon a misconstruction of the statement contained in respondent's affidavit, but that the statement, as made, was true. As heretofore indicated, we dissent from both conclusions and are of the opinion that the charge is sustained in either aspect.

Specifications numbered "fifth," "sixth" and "seventh" relate to the conduct of the respondent in the action of *Jacobson v. Jacobson*, an action for a separation, in which the respondent appeared as substituted attorney for the plaintiff, Anna Jacobson, and in proceedings incidental thereto. A final decree in that action was entered on January 6, 1914, granting the plaintiff alimony at the rate of \$15 per week

from December 24, 1913. Upon the motion of the respondent, one Rosenberg was appointed receiver, with the usual powers, in sequestration proceedings thereafter begun in the action. Pursuant thereto, Rosenberg as receiver commenced an action against the defendants Jacobson and Wittal to set aside a conveyance of certain real estate at 75 Stanton street, on the ground of fraud, and certain proceedings against certain tenants of the premises in question, the respondent acting as attorney for the receiver. The petition charges that in June and July, 1914, the respondent, as attorney for the receiver, collected the sum of \$880 in rentals from certain tenants of the premises, and unlawfully refused to pay over the same or the balance adjudged to be due to the receiver, and withheld and converted the said moneys until adjudged in contempt and ordered to be imprisoned until he paid the sum of \$1,031.16.

It is not disputed that the respondent or his agents collected \$880 from certain tenants of the premises while summary proceedings were pending against them in the Municipal Court. The receiver testified that he was first informed of these collections early in June, 1914, when the respondent stated to him that he had collected rents from several tenants and would send the money to him as soon as he (respondent) put the checks through the bank. Upon the failure of the respondent to pay over the moneys after subsequent demand, the receiver made a motion in the Supreme Court for a substitution of attorneys.

The papers in that motion were entitled in the case of *Jacobson v. Jacobson*. The motion was referred to Henry A. Forster, to determine what amount, if any, was due the respondent for his services and disbursements on behalf of the receiver, and upon what terms a substitution should be ordered. The respondent had theretofore been authorized by order of the court to retain as compensation the sum of \$200 and disbursements amounting to \$23.19. The referee reported that the substitution of attorneys should be ordered without any terms and that the respondent should be denied any further compensation as attorney for the receiver. The report of the referee was confirmed on November 13, 1914, one Gordon being substituted as attorney for the receiver,

App. Div.]

First Department, June, 1917.

and the respondent was directed to turn over to the receiver or his attorney all moneys, papers or property of any kind belonging to the receiver. The respondent's appeal to this court from that order was dismissed.

The respondent refused to comply with the order of substitution, and the receiver thereafter moved to punish him for contempt for failure to pay over the said moneys. The motion was denied because the order of substitution failed to fix the amount of money in the respondent's possession belonging to the receiver, the court stating in an opinion that "the order of substitution adjudicates finally that the respondent has no lien, and any claim that he now makes for compensation out of the funds in his hands is utterly without merit." The receiver thereupon moved again for an order directing the respondent to turn over all moneys in his possession, and it appearing that the amount thereof was in dispute, the order directing such payment referred the matter to a referee to take proof of such amount and report with his opinion to the court. The referee thus appointed found that the respondent, while acting as attorney for the receiver, personally collected an aggregate sum of \$880 from four tenants of the premises at 75 Stanton street as rent for the months of June and July, 1914, and that out of this sum he was entitled to deduct \$223.19 for his compensation and disbursements, the remaining \$656.81 being due from him to the receiver. The report of the referee was confirmed by an order of the court on June 17, 1915, which order was affirmed on appeal to this court (*Jacobson v. Jacobson*, 170 App. Div. 966). An appeal taken to the Court of Appeals was dismissed. (216 N. Y. 707.)

On December 31, 1915, the respondent was adjudged in contempt of court for his failure to pay the receiver the sum of \$1,031.16, the order decreeing that he be fined in that sum and imprisoned until the same be paid. The respondent, on January 10, 1916, paid to the sheriff of this county the sum of \$1,086.62.

The respondent seeks to justify the withholding of the moneys collected upon two grounds. He claims that \$322.50 was deposited with him by three tenants, with the consent of the receiver, under the following trust agreement:

" We, the undersigned, do hereby deposit with Mr. Max Brown, as trustee, to keep for us, the sums set opposite our names, to be kept by him until the final determination of an order to compel Ignatz Jacobson, defendant in the action of Rosenberg against Jacobson, pending in the Supreme Court, New York county, to turn over the sum of \$1,115, which includes the rental collected from the undersigned for the months of May and June, 1914, for the premises Nos. 75 & 77 Stanton Street, Borough of Manhattan, City of New York; and that in the event the said moneys are paid over by said Ignatz Jacobson to the receiver, that we, the undersigned, are to receive credit for the same for the last month if the receiver will collect the necessary arrears, at which time said money should be turned over to the receiver, or if the undersigned will pay for said months then said money to be returned to the undersigned.

" It is hereby expressly understood that the money deposited with Mr. Brown was not deposited with him as attorney for the receiver but as trustee for the undersigned.

" HARRY PELCYGER.....	\$187 50
.....	70 00
.....	65 00"

The respondent testified that the above agreement was drawn in the presence of the attorney for the tenant, Pelcyger, who advised the tenant to sign it, and that other tenants deposited \$65 and \$70 respectively, under the same agreement. Neither the attorney nor the other tenants referred to were called as witnesses for the respondent, nor was their absence explained. Pelcyger himself testified that he gave the respondent certain checks "for the receiver, for rent." Rosenberg, the receiver, testified that he never authorized the respondent to collect the rents in question, and that when he first learned of such collections, about June 9 or 10, 1914, the respondent stated that he would turn over the money to him as soon as the checks were put through the bank, which he failed to do. While he denied any knowledge of the alleged trust agreement, he stated in an affidavit verified July 7, 1914, as follows: "Deponent has not collected one cent rent for the months of May and June from the tenants because the tenants

App. Div.]

First Department, June, 1917.

are poor people, small business people, and they say they could not afford to pay again; that only three tenants have deposited one month's rent to be kept in abeyance to await the outcome of this motion as it appears by their affidavits hereto annexed."

The respondent further claims to have been justified in withholding the moneys in question by reason of his alleged possessory lien, which he claims he would have lost by parting with the money. He contends, in this connection, that there has been no adjudication on the question of the lien, and that the order, though entitled in the action of *Jacobson v. Jacobson*, in fact related to the action of *Rosenberg v. Jacobson and Wittal*.

The respondent offered in evidence a written agreement alleged to have been entered into between himself and the plaintiff in the action, Anna Jacobson, by which he was retained by her to bring an action in the City Court of the city of New York against the defendant Ignatz Jacobson to recover the sum of \$1,800 due the plaintiff for arrears in alimony. The respondent's compensation, as provided in the agreement, was to be "one-third of any sum which may be recovered either by suit or settlement, and in addition thereto the costs which may be awarded by the court." This retainer, in terms, refers to an action in the City Court, and not to the sequestration proceedings in which the respondent acted as attorney for the receiver. The petitioner contends that it is, in any event, illegal and unenforcible. In *Mooney v. Mooney* (29 Misc. Rep. 707) Mr. Justice SCOTT said: "Indeed, so far as concerns his claim for services in enforcing the payment of alimony, the law does not permit an attorney's lien to attach to the alimony paid to the wife under a decree. It is intended for the support of the party to whom it is awarded, its amount is fixed with reference to her necessities, and the courts will not countenance its appropriation to any other purpose." (See, also, *Matter of Bolles*, 78 App. Div. 180; *Van Vleck v. Van Vleck*, 21 id. 272; *Matter of Brackett*, 114 id. 257.) The respondent seeks to distinguish the instant case on the ground that he was a substituted attorney in the action. The distinction is urged without authority or reason in its support and is untenable.

Nor is there any merit in the respondent's contention that the substitution of attorneys for the receiver was ordered in the action of *Rosenberg v. Jacobson and Wittal*, and not in *Jacobson v. Jacobson*. While the decree awarding alimony to the plaintiff in the latter action was entered on June 6, 1914, the sequestration proceedings thereafter instituted were in continuation of that action, and the order of substitution was, therefore, properly entitled.

Assuming, however, that the respondent's claims as to both the trust agreement and lien are tenable, his own testimony establishes a conversion of a large part of the moneys collected. Of these sums, checks aggregating \$640 were deposited in the account of "Max Brown, Attorney," in the National Park Bank of New York, and a check for \$60 was deposited in the State Bank. A transcript of the account in the National Park Bank shows that on April 26, 1915, there was a balance of only \$3.51 to the credit of the account in that bank, and a like balance on January 1, 1916. The respondent testified that this was his daughter's account, in which he sometimes deposited his own moneys and moneys received on collections for clients. He admitted personally using the moneys involved in the present proceeding, testifying: "I was justified. It was with the consent of the receiver. His own testimony shows he said he will wait until I collect the checks from my bank. And it was given to me by orders of the court besides. * * * That was given to me also under the contract which is in evidence." The respondent's attempted justification does not, however, justify. A possessory lien assumes the *res* to be in the possession of the person asserting the same. The existence of such a lien does not entitle the lienor to use the property subject thereto. In doing so the respondent was guilty of a conversion of the moneys collected by him.

The sixth specification of misconduct charges that the respondent in August, 1914, wrote the receiver a letter in which he falsely stated that by order of the court an allowance had been made to him (respondent) of the sum of \$1,000 for his services as attorney for the receiver. The letter reads as follows:

"Please take notice that pursuant to the order a certified

App. Div.]

First Department, June, 1917.

copy of which is served upon you herewith, you are required to pay me as follows:

" Counsel fee allowed by Court, \$1,000, to be paid in the following manner:

" As per order of July 21, 1914.....	\$200 00
" As per order of August 24, 1914.	200 00
" Payment made by order of May 14, 1914.....	50 00
" From the rent of September, 1914.....	250 00
" From the rent of October, 1914.....	300 00

\$1,000 00

" In addition thereto you are to pay me \$633.33, one-third of the \$1,900.00 arrears; \$250 for the trial in *Jacobson v. Jacobson*;

" \$50.00 motion costs allowed by the Court;

" \$44.31 disbursements allowed by the Court.

" You have collected up to September 1..... \$982 50

" I have collected..... 880 00

" making a total of..... \$1,862 50

" You are therefore required to pay me, from the moneys in your hands, \$497.31, inclusive of the \$550 which you will have to pay from the collections of the September and October rents. I therefore respectfully ask you to pay the same to bearer, who is serving you with a certified copy of this order."

The order referred to is as follows:

" Ordered that the motion be and the same hereby is in all respects granted, except that Mr. Max Brown, the said attorney for the plaintiff herein and said receiver, Nathaniel Rosenberg, be and he hereby is allowed at this time a further sum of \$200 on account of his fee for services rendered, with leave, however, to apply for the balance of said fee; and it is further

" Ordered that the receiver, Nathaniel Rosenberg, be and he hereby is directed to pay over to Max Brown, attorney for the receiver and the plaintiff herein, and to the plaintiff herein, the sums as prayed for in the moving papers herein."

The respondent contends that a reference to the papers

upon which the motion was "in all respects granted," with the exception noted in the order, establishes the complete truth of the statement of which the petitioner complained. The motion, as stated in the notice of motion, was "for an order fixing the amount of counsel fees and for the distribution of the moneys collected by the receiver and the attorney for the receiver." The respondent's affidavit read in support of the motion asked that his fee be fixed at \$1,000, with directions as to the payment thereof.

Of the respondent's letter to the receiver, the court at Special Term said in an opinion on the motion for a substitution:

"It further appears that the respondent attorney, though the Court in granting the order entered on August 24, 1914, for the payment of \$200 on account, specifically refuses to pass upon the question finally of the amount of compensation to which the respondent attorney would be entitled, falsely stated to his client, the receiver, in a letter which has been attached to one of the affidavits herein, that the court had allowed him compensation in the sum of \$1,000."

Specification seventh charges the respondent with taking an appeal to the Court of Appeals in disregard of the following stipulation:

"An appeal having been taken herein by Max Brown, from an order made by Hon. Daniel F. Cohalan, dated the 17th day of June, 1915, and an order having been made on the 1st day of July, 1915, granting a stay of proceedings until the determination of that appeal, and said order having been subsequently modified by an order made on the 13th day of July, 1915, it is agreed, that the appellant will argue said appeal at the October, 1915, Term; that no appeal will be taken in the event of an adverse decision to appellant.

"Dated, NEW YORK, July 22d, 1915.

"M. BROWN,

"Attorney for Appellant.

"HARRY A. GORDON,

"Attorney for Respondent."

This stipulation was entered into pursuant to an order granting a stay pending an appeal to this court, which stated:

App. Div.]

First Department, June, 1917.

" Upon the foregoing papers, this motion for a stay pending appeal is granted upon condition that the appellant, Max Brown, file a surety company bond in the sum of \$1,500.00 within three days from date hereof, conditioned that if the order appealed from be affirmed he will without delay pay the amount named in the order appealed from, with all costs and disbursements incident thereto; that he will not appeal from the decision if adverse to him; that he will notice said appeal for and argue same at the October, 1915, term, and that he will pay ten dollars costs of this motion within three days after entry of this order.

J. W. G.,

"J. S. C."

In spite of the above stipulation, an appeal was taken to the Court of Appeals from the order of affirmance of this court. A motion to dismiss such appeal on the ground that the appellant had stipulated not to appeal to the Court of Appeals was thereafter granted. The respondent contends that the stipulation was not binding on him, for the reason that it was signed by his son, and that on being informed of it he immediately repudiated the same. He further claims that the stipulation is invalid "for the reason that a party cannot stipulate away a right to appeal." The Court of Appeals has apparently adjudicated the question of its validity, and the respondent, having taken advantage of the stay, is not in a position to avoid the responsibility imposed by the stipulation.

In our opinion, the specifications of the charges above set forth have been fully sustained by the evidence. The report of the referee is disapproved as to such charges, and this court finds as matter of fact that they are sustained, and that the respondent has been guilty of gross misconduct in his profession, *first*, by making a false affidavit with intent to deceive the court; *second*, by improper collection of rents due to a receiver appointed by the court, by refusing and neglecting to pay over upon demand, and by converting a large part thereof to his own use; *third*, by making a false statement in his letter to the receiver that the court had made an allowance to him of \$1,000; and, *fourth*, by violating a written stipulation. The conduct of which he is found

First Department, June, 1917.

[Vol. 178.]

guilty is of such a nature as to demonstrate his unfitness to remain in the profession of the law, and he should be and hereby is disbarred.

LAUGHLIN, SCOTT, DOWLING and SMITH, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

In the Matter of HARRISON E. HOYT, an Attorney, Respondent.

First Department, June 15, 1917.

Attorney at law disbarred.

Attorney at law disbarred in that, after his election as director of a fraternal benefit association, he aided and abetted a conspiracy to loot the treasury of the association by appropriating securities, etc.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie [*John Neville Boyle* of counsel], for the petitioner.

Samuel H. Wandell, for the respondent.

CLARKE, P. J.:

The facts about which there is no dispute have been substantially found by the learned official referee as follows:

The respondent was admitted to practice at the General Term of the Supreme Court, county of Monroe, in October, 1883, and was practicing in the First Judicial District at the time he committed the acts charged against him. He was also admitted to practice in the State of Colorado where he had lived for about twenty years. In 1910 he had become acquainted with one Eugene C. May and Joseph E. Blackburn, two general promoters, and all three had their offices in the same suite. He was told by May, in a general way, that May and Blackburn were arranging to get control of various fraternal organizations for the purpose of merging and reinsuring them; that they were thinking of taking up the Keystone

App. Div.]

First Department, June, 1917.

Guard of Pennsylvania and that in this connection respondent could be utilized. At Blackburn's request respondent examined the laws of Pennsylvania and rendered him a written opinion as to the control of the Insurance Commissioner over fraternal orders. At May's request he attended with May and Blackburn the biennial convention of the Keystone Guard at Denver, Colo., in June, 1910, and was present when the amendment to the constitution was passed authorizing the trustees to sell or exchange securities belonging to the organization upon the authority of the board of directors. While there respondent asked May what the plan was. May told him that it was a question of getting control of several fraternal orders for the purpose of turning them over to another company to get a commission of fifty per cent of the first year's premiums turned in; that the object of acquiring control was for the purpose of being able to deliver the Keystone Guard to the company in which it was to be reinsured and that it required five of the nine directors to acquire control; that the outgoing directors would have to be paid for their resignations and giving up lucrative positions; that the five to replace them would be respondent, Blackburn, May and two others and that the respondent would be required to act as a director in such a way as May and Blackburn could use him. Respondent inquired how he would be reimbursed, to which May said, "We will have to get this one first and then several others," and that when the time came respondent would be taken care of. A few days after Blackburn had returned from Denver he told respondent that he was arranging for a loan and asked respondent to meet Ridgway, the attorney for the party from whom Blackburn expected to get the loan. Blackburn requested respondent to take the written opinion about the Pennsylvania laws and a copy of the resolution passed at Denver and consult with Ridgway. Respondent met Ridgway to whom he furnished the papers requested by Blackburn. So far as respondent was concerned he understood that Blackburn was borrowing the money. Respondent was told by Ridgway that his man took a flyer once in a while.

The Keystone Guard had nine directors and three trustees. When the necessary resignations had been arranged respondent was elected a director and trustee. May was elected chairman

of the board of trustees and the third was a man named Gray. Blackburn, May and he were also elected directors as was also one Holland. Blackburn was also elected treasurer.

On June 27, 1910, the respondent and the two other trustees signed and delivered to Blackburn the following authorization:

“ATHENS, PENNA., *June 27, 1910.*

“MR. J. E. BLACKBURN:

“You are hereby authorized to sell or exchange any or all of the securities of the Keystone Guard now held by us as Trustees, and accounting to us therefor as such Trustees.

“EUGENE C. MAY, *Chairman,*

“HARRISON E. HOYT,

“J. F. GRAY.”

Thereafter an important meeting took place at Athens, Penn., which was the home office of the Keystone Guard, a fraternal insurance company organized under the laws of Pennsylvania, on July 8, 1910, at a bank where the securities of the guard were kept. Among others, May, Blackburn and the respondent were present and also David S. Mills, president of the Audubon National Bank, and his attorney, Ridgway. Haverly, one of the outgoing directors and retiring treasurer, was also present. Stanton, one of the outgoing directors, had advised respondent that the three new trustees of whom respondent was one and May, chairman, had had their bonds accepted by a surety company and had qualified. Haverly brought the securities into the room from the safety deposit vault in two boxes which were placed in front of May who asked to have them checked. A printed list was produced and the securities were checked up with that list. May called off the securities to respondent who did the checking. On May's request respondent wrote out a list of the securities from what May read, of which respondent made a copy. Exhibits 5 and 6 are two sheets constituting the face and back, respectively, of a bill of sale, dated June 8, 1910, made by May and Hoyt, as trustees, witnessed by Ridgway, of securities in the schedule which appears at the back. The consideration recited is one dollar and other good and valuable considerations. The bill of sale runs to Black-

App. Div.]

First Department, June, 1917.

burn. The securities appear to be all of the securities mentioned in the report of the officers to the biennial convention held at Denver. Respondent executed this bill of sale after the securities were brought out. It was also executed and acknowledged by May at the same time. There was no consideration for the bill of sale. Receipts were given to the outgoing trustees for the securities. Then from the bulk of the securities covered by said bill of sale, \$100,000, par value, of bonds were selected and offered to Mills. He and his attorney, Ridgway, examined them and they were pronounced by Mills to be all right. They were then delivered to Ridgway who gave a receipt for them as having been delivered to him by May and Hoyt. Mills thereupon produced \$50,000 in money which he handed to Ridgway who gave it to Blackburn; the latter in turn gave it to Haverly, who was sitting in the same room, who thereupon proceeded to count it and then accepted it. In doing so Haverly announced that he had consulted an attorney with reference to the legality of his and his associates accepting \$50,000 as compensation for giving up their offices, and that he had been told it was proper and legal, provided none of the money to be paid came out of the Keystone Guard assets, and he also inquired of Blackburn, May, Mills, Ridgway and the respondent whether any of the securities of the Keystone Guard had been pledged for the loan, to which all answered "no," except the respondent, who said, "not to my knowledge."

Thus it will be seen that at the time Haverly received the \$50,000 he was no longer treasurer of the organization, and had resigned his other position, so that the payment of the \$50,000 to Haverly for the benefit of the outgoing directors and the surrender of \$100,000 securities to Mills were made after Blackburn and his associates were in control and had qualified. The respondent subsequently received from Blackburn, after consultation with May, the sum of \$5,000 for his services generally in addition to his expenses. A month or two after July 8, 1910, Stanton came to respondent's office to see Blackburn; not finding him in, Stanton spoke to respondent asking in substance whether Blackburn was making arrangements to pay the other \$50,000. Stanton told respondent that the arrangement was that Blackburn was to pay

\$100,000, of which he had only paid \$50,000 and had given his note for the other \$50,000. Respondent called this conversation to Blackburn's attention when he came in, and Blackburn said, "that's all right, I am paying those fellows for giving up their positions."

This whole transaction turned out disastrously. Blackburn's reinsurance plan failed and a receiver was appointed for the Keystone Guard. An action was brought by said receiver against the Audubon National Bank to recover the value of the securities which had been wrongfully delivered to Mills by Blackburn. This action resulted in a judgment in favor of the plaintiff in the sum of \$50,000, which, however, has not been collected as the Audubon National Bank went into liquidation.

The respondent seeks to meet the charge which characterizes the transactions participated in by him as described, as constituting professional misconduct, by claiming and testifying in substance that he was only a dummy trustee and director by the grace of May and Blackburn; that he had faith in them and acted for them as directed by them; that neither of them had informed him as to the real nature of the agreement with Mills, pursuant to which the \$50,000 was paid and these securities of the Keystone Guard were pledged therefor, and that he acted throughout in complete ignorance thereof and in the belief that every thing was all right and legitimate.

The learned referee concludes as follows: "I fail to see that this claim and testimony can be held in view of all the facts and circumstances disclosed to amount to an exoneration of the respondent. He knew that May and Blackburn had agreed to pay the majority of the Board of Directors of the Keystone Guard for their resignations; he knew that they had no money; he knew that Blackburn had attempted to borrow money from a client of Ridgway, and in fact had assisted somewhat in procuring the loan by discussing the legal affairs of the Keystone Guard with Ridgway; he knew that at the time the securities were handed over to Mills the outgoing directors had resigned, but had not yet been paid for giving up what to them were lucrative positions; and he knew that he himself had qualified as director and trustee. As such director and trustee it was his duty to make

App. Div.]

First Department, June, 1917.

full inquiries into the particulars of the transaction about to be consummated with Mills and to prevent its consummation if he should find that the proposition was to pledge the securities of the corporation to Mills in order to enable Blackburn to procure a loan with which to pay his personal obligation to persons who had resigned at his request. The discharge of this duty became all the more important when Haverly asked the question whether the securities of the corporation were to be pledged.

"The consummation of the transaction in the manner hereinbefore detailed should of itself have aroused the suspicion of the respondent as an experienced legal adviser. The conclusion is therefore unavoidable that the respondent, by omitting to make proper inquiry and participating in the carrying out of the scheme of Blackburn to the extent hereinbefore described, was guilty of conduct unbecoming an attorney and counsellor-at-law, even if he had no actual knowledge of the agreement between Blackburn and Mills and Ridgway to the effect that the securities were to be pledged.

"It is true that some time thereafter the respondent assisted the receiver of the Keystone Guard, who brought several actions to recover for the conversion of the securities in question, by making a free statement of all he knew about the transactions; and it is also true that in the course of the trial of the indictment against Mills and others in the United States District Court, for the Southern District, the respondent was a witness for the prosecution, but these matters do not amount to exoneration, but only constitute mitigating circumstances."

It should also be stated that respondent has submitted a number of testimonials as to his character and has also voluntarily refrained entirely from the practice of the law since the filing of the complaint before the grievance committee of the Association of the Bar.

The general scheme of adroit and unscrupulous men who by their manipulations secure control of a financial institution and then make use of the securities of that institution to pay their personal obligations incurred in the process of acquiring control is unhappily a familiar incident in the recent financial history of this country. The wreck and ruin

following in the wake of such transactions is also too frequent to excite surprise. Respondent has been long at the bar and can plead neither youth nor professional inexperience. He was not the mere legal adviser of the master minds of this transaction, but became, upon his own confession, their pliant tool in putting it through, and he did this for a monetary consideration. He allowed himself to be elected a director of the corporation and one of the three trustees of its assets. Ignoring the fiduciary obligation personally assumed by him to the corporation, he did what he was bid to do by Blackburn and May. He thus aided and abetted in the most material way the carrying out of the conspiracy; he actually participated in the important details by which the treasury was looted. It is incredible that he did not understand fully what was transpiring in the directors' room of the bank at Athens, when he was examining and checking up the securities of the corporation, making lists and copies thereof, executing bills of sale and witnessing the transfer of a large block of said securities and the handing over to his office associates the money which he knew theretofore they had been attempting to borrow from Mills.

It is, of course, conceivable that he did not foresee the disaster which was to follow, and, conscience stricken, thereafter testified in the criminal and civil proceedings. Whether with full knowledge he took part in this scheme, or was so dense as not to appreciate what was going on under his very eyes, it is equally unsafe to allow him to continue to hold himself out as a member of the learned and honorable profession of the law.

Upon this record we are forced to approve the conclusion of the learned official referee and are of the opinion that the respondent should be and he hereby is disbarred.

SCOTT, SMITH, PAGE and DAVIS, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

In the Matter of HERMAN C. POLLOCK, an Attorney,
Respondent.

First Department, June 15, 1917.

Attorney at law censured — conversion of money belonging to client.

Attorney at law censured for converting to his own use money collected for his client, and also money paid to him by the client for deposit in court.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie [*Harry Crone* of counsel], for the petitioner.

I. Gainsburg, for the respondent.

CLARKE, P. J.:

The respondent was admitted to the bar in January, 1910. The petition contains two separate charges of misconduct, which are as follows:

“(a) On or about July 29, 1915, the respondent, while acting as an attorney for one Joseph J. Yabroudi, collected the sum of \$139.91, the net proceeds of a judgment obtained in Yabroudi's behalf in the State of Ohio. The respondent converted this money to his own use and up to December 27, 1915, concealed from his client the fact that the money had been collected. On December 27, 1915, the respondent then admitted that he had received the money and promised to account therefor within a few days. On January 3, 1916, respondent paid to Yabroudi \$87.91, that being the amount collected less respondent's fees for services rendered. The respondent at no time had any claim or lien upon the said sum of \$87.91.

“(b) In April, an action for rent brought by one Gabriel against Yabroudi was pending in the Municipal Court of the City of New York and Yabroudi then gave respondent, who was acting as his attorney, the sum of \$22 to be deposited in Court in connection with said action. The respondent

failed to deposit the money, although he had agreed to do so, but converted it to his own use.

" On August 5, 1915, Yabroudi, having learned that the money had not been deposited in Court, demanded the return thereof from the respondent, who then gave Yabroudi a check for \$22 which was returned unpaid by the bank on which it had been drawn, as there were not sufficient funds in respondent's account to meet it. The check was again deposited on August 11, 1915, and again returned by the bank for the same reason. Thereafter several demands for the money were made upon the respondent, and in September, 1915, he paid it.

" The respondent had no claim or lien upon the said sum of \$22."

With respect to the first charge, designated (a) the respondent admitted the receipt of the \$139.91 by check early in August, 1915, and that he cashed the same at the hotel at Hunter, N. Y., where he was then stopping, and dealt with at least a part of the proceeds as if they were his own. He testified, however, that he informed Yabroudi of the receipt of the money upon his return to New York city about August 15, 1915; that Yabroudi then owed him for professional services other than those rendered in the collection of the said \$139.91, which he sought to deduct from the collection; and that intermediate the receipt of the money and the payment of the balance of \$87.91 to Yabroudi on January 3, 1916, he had numerous heated discussions with Yabroudi with reference to his claims for compensation out of the sum collected.

While Yabroudi admitted that the respondent had performed services for him in various other matters, and that there was a "running account" between them, he denied that he was indebted to the respondent in any sum whatever at the time he intrusted him with the collection in question, or that the respondent informed him that the same had been made until January 3, 1916.

Considering the evidence in the light most favorable to the respondent, we fully concur with the conclusion of the learned official referee that he has been guilty of a course of procedure repeatedly condemned by this court. As stated in *Matter of Evans* (169 App. Div. 502): " It matters not that

App. Div.]

First Department, June, 1917.

respondent and his client were, for some time, unable to agree as to the amount to be paid, or that respondent, as he claims, could at any time have made good the amount, even if it had been lost in speculation. The offense of which respondent was guilty, and it is a serious one, was in dealing with his client's money as if it were his own, and in subjecting it to any risk of loss whatever."

With respect to the second charge (b) it appears that the respondent represented Yabroudi in two actions brought against him by one Gabriel in the Municipal Court to recover one hundred and eighty dollars and fifty dollars respectively. Yabroudi denied that there was any money due from him on account of the first cause of action, but conceded an indebtedness of twenty-two dollars on the second cause of action. The respondent admitted the receipt of twenty-six dollars and fifty cents from Yabroudi about a week before the return day, twenty-two dollars of which was for deposit in court. Instead, he deposited the money in his bank and on the day before the return day gave his clerk, one Brady, a check for twenty-six dollars and fifty cents with instructions to cash the same and deposit the cash in court, twenty-two dollars thereof as a tender under the second cause of action and the balance as a jury fee. Brady neglected to cash the check but on the call of the calendar offered to deposit it with the clerk of the court. The clerk refused to accept the check, and later in the same day refused also to accept a tender of cash because not made on the call of the calendar. The actions were tried in May, 1915.

The respondent testified that he advised Yabroudi of the unsuccessful attempt to deposit the check in court as a tender, and that the latter consented that he retain the twenty-six dollars and fifty cents on account of services rendered for which he had not been paid. He claims to have given Yabroudi the two checks for twenty-two dollars each, the first of which was returned for lack of funds, in response to the latter's request for a loan. Yabroudi denied that he consented to the retention of the money, or that he was informed by the respondent of the latter's failure to deposit the same in court until after he had learned of such failure from the plaintiff's attorney in negotiations for the payment

of the judgment. He testified that he then demanded the return of the money from the respondent, and received the first check for twenty-two dollars.

The learned official referee has reported that in his opinion Yabroudi did not consent to the retention of the money by the respondent. We think his conclusion amply sustained by the evidence. In applying to his own use moneys received from his client for a specific purpose, the respondent has been guilty of a breach of trust which cannot be overlooked by this court, irrespective of the injury wrought to the client in an individual case. In view, however, of the respondent's few years at the bar, his moderate demands upon Yabroudi and the latter's unreasonable attitude throughout his relationship with the respondent, we are disposed to accept the recommendation of the learned official referee that moderate discipline will serve the ends of justice.

The respondent should be and hereby is censured for his misconduct.

SCOTT, SMITH, PAGE and DAVIS, JJ., concurred.

Respondent censured. Order to be settled on notice.

In the Matter of JOHN M. COLEMAN, an Attorney, Respondent.

First Department, June 15, 1917.

Attorney at law suspended for conversion of moneys delivered to him for use in paying referee's fees — circumstances not excusing misconduct — intent to repay, no excuse.

Attorney at law suspended from practice for converting to his own use moneys paid to him to be deposited with a referee in payment of the latter's fees and disbursements, so as to secure the delivery of the referee's report.

Failure to so apply such money is not excused by the fact that a doubt existed in the mind of the attorney and his associate as to the soundness of the referee's conclusions, and by the fact that pending disciplinary proceedings had disrupted his business and left him in a highly agitated state of mind.

Under no circumstances is an attorney warranted in using his client's money as his own, and an intent to repay is no excuse for such misconduct.

App. Div.]

First Department, June, 1917.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie, for the petitioner.

George E. Quigley, for the respondent.

CLARKE, P. J.:

The respondent was admitted to the bar in July, 1906. Upon a charge of unprofessional conduct preferred by the present petitioner, this court, on December 30, 1915, directed that he be suspended from practice for six months, and an order to that effect was entered on January 25, 1916. (*Matter of Coleman*, 170 App. Div. 537.) Prior to the expiration of such term of suspension, a supplemental petition was filed against the respondent which charges, in substance, that he converted to his own use the sum of \$218 which he received from Messrs. Murray, Prentice & Howland upon the distinct understanding that the said sum was to be used solely for the purpose of paying the fees and disbursements of the referee in a proceeding conducted by him in behalf of the Cornell Construction Company, for which Murray, Prentice & Howland were acting as general counsel.

It appears that in April, 1915, the respondent called upon William Roberts, an attorney associated with the firm of Murray, Prentice & Howland, general counsel for the Cornell Construction Company, and informed Roberts that there were certain funds on deposit in the office of the chamberlain of the city of New York, which might be collected by the company upon its claim against one Flora Sawyer. Negotiations were thereafter had resulting in the retainer of the respondent by the company for the purpose of making the collection, it being agreed that the respondent should receive forty per cent of the amount collected in payment for his services.

The respondent thereupon commenced a surplus money proceeding in the Supreme Court in which a referee was appointed to determine the ownership of the moneys on deposit with the city chamberlain. Thereafter, in the summer of 1915, the referee notified the respondent that he intended to report to the court that the Cornell Construction Company

was entitled to the money, but stated that he would not deliver his report until his fees, as referee, and disbursements, amounting in all to \$218, were paid.

In November, 1915, the respondent informed Roberts of the status of the proceedings, and that he, the respondent, was unable to advance the money to cover the fees and disbursements of the referee. The matter was taken under consideration by Murray, Prentice & Howland, who, on November 10, 1915, sent respondent a check for \$218, payable to his order, to cover the same. The respondent contended before the official referee that this payment to him was not specifically for payment over to the referee, but was to reimburse him when he should determine to pay the referee the sum due. He has apparently abandoned such claim before this court, however, and the evidence clearly shows that the check was delivered to the respondent for the specific purpose of enabling him to pay the referee and procure the filing of the report.

Instead of using the check for this purpose, the respondent concededly deposited it in his bank and used the proceeds as his own. His bank account, which was offered in evidence, shows that whereas his balance on the day he received the check amounted to only about \$30, he immediately upon the deposit of the check drew and cashed checks aggregating \$130. He made no payment whatever to the referee until January 12, 1916, when he gave him \$120 in cash and his check for \$98 drawn upon the Empire Trust Company. Whether this check was formally presented for payment and dishonored does not appear, but the respondent makes no pretense that he had sufficient funds on deposit to meet it, testifying that he told the referee, "Now, I will protect this check, and when this is done, why I want you to file the report."

After sending the check for \$218 to the respondent, Roberts heard nothing further regarding the matter until January, 1916, when he learned through an attorney associated with the respondent in the proceeding that the referee had not filed his report for the reason that his fees and disbursements had not been paid in full. The respondent then admitted to Roberts that he had paid the referee only \$120 in addition

App. Div.]

First Department, June, 1917.

to the check for \$98, which had not been made good, and Murray, Prentice & Howland forthwith paid the referee the \$98 still due. They were thereupon substituted as attorneys in the proceeding, and the \$98 thus paid by them was deducted from the respondent's share of the recovery, amounting to about \$700. It appears from the testimony of Roberts that the reason for the substitution was rather the pending entry of the order suspending the respondent than by his conduct in the proceeding, and that the subsequent details were conducted by the attorney whom the respondent had associated with him in the matter.

The respondent explains, and seeks to excuse his failure to promptly apply the proceeds of the check to the use for which it was given by the fact that a doubt existed in the mind of himself and his associate as to the soundness of the referee's conclusions, and by the fact that the pending disciplinary proceedings had disrupted his business and left him in a highly agitated state of mind. We are of opinion, however, that the circumstances disclosed present no excuse for the misconduct charged and proved. At the time of the receipt of the check, and unknown to his client, the learned official referee had already filed his report in the original proceeding, finding the respondent guilty of misconduct in procuring moneys from a former client, a poor woman ignorant in business matters, that he might acquire for himself an interest in a mining venture. In such a situation it might be expected that an attorney, however lax in the performance of his duties to clients theretofore, would observe most scrupulously the ethics of the profession in which his privilege to membership had thus been questioned. Instead, we find the respondent disregarding one of its most fundamental canons. Under no circumstances is an attorney warranted in using his client's money as his own. A breach of this rule is the pregnant source of most disciplinary proceedings.

It is not enough that the respondent may have intended to reimburse his client by the subsequent payment to the referee of the moneys due. Such an intent has been repeatedly held to be no excuse for an attorney's using his client's money as his own. Nor do we consider it important that the client, in the matter under consideration, was likely to suffer, and in

fact did suffer no injury as a result of the respondent's misconduct. Finding, as we do, that the respondent is guilty of the misconduct charged, it becomes our duty to appraise that misconduct, not with reference to the injury sustained by the client, but with reference to the respondent's fitness to remain a member of the bar.

Respondent has made a moving appeal for clemency. He asserts that although overwhelmed by disaster incident to his former suspension, with a large number of judgments piled up against him, he has refrained from taking advantage of the bankruptcy statute but has earnestly worked to reduce his indebtedness and has paid off a considerable part thereof, and will eventually pay in full. He further shows that his suspension, which was for six months, has by the institution of this proceeding been now extended for a year and four months and that he has suffered a severe punishment. We are impressed with his apparent sincerity and are of opinion that he has learned his lesson. We think there was no dishonest intention to convert his client's money in this last case, because he had an acknowledged equity in forty per cent of the amount in the hands of the chamberlain available immediately upon the confirmation of the referee's report. He improperly used the money intrusted to him for a specific purpose, but under all the circumstances we think a further suspension for six months, which will make two years in all, will be adequate, and it is so ordered, with leave to apply for reinstatement at the expiration of that term upon proof of his compliance with the conditions to be incorporated in the order to be entered hereon.

LAUGHLIN, SCOTT, DAVIS and SHEARN, JJ., concurred.

Respondent suspended for six months, with leave to apply for reinstatement as stated in opinion. Order to be settled on notice.

In the Matter of CHARLES C. BRANCH, an Attorney,
Respondent.

First Department, June 15, 1917.

**Attorney at law — evidence not sustaining charge of conversion —
attorney at law censured for false statements before grievance
committee — purpose of disciplinary proceedings.**

Charges against attorney of having converted his client's money to his own use *held*, not to have been sustained, it appearing that such money received in settlement of a claim for the client had been delivered to another for payment to the client.

Attorney at law severely censured for endeavoring to conceal from the grievance committee payments to the complaining witness for the purpose of buying him off and securing the withdrawal of charges, and for the making false statements upon the hearing denying such acts.

Disciplinary proceedings are instituted not for the purpose of adjusting differences between attorney and client, or for forcing a settlement or bringing about the collection of moneys claimed to be due, but are solely for the purpose of maintaining the dignity and honor of the profession. The purpose is to exercise the great and summary power of the court, not for the benefit of a complaining individual, but for the good of the community.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie [*Guernsey Price* of counsel], for the petitioner.

Burt L. Rich, for the respondent.

CLARKE, P. J.:

The respondent was admitted to the bar in February, 1904. In March, 1915, one John J. Sherrock, had a claim against the Ford Motor Car Company for personal injuries he had sustained in an accident. Shortly after the accident he met one Edmund A. Brown, who had the privilege of a desk in the office of respondent, on the door of which his name was painted. Through Brown Sherrock retained respondent on April 8, 1915, upon a fifty per cent basis to recover damages and respondent thereupon brought an action. Negotiations thereafter ensued for a settlement with a casualty company which was adjusting the claim and a settlement was agreed

upon in the sum of \$225 which was paid by a draft dated May 13, 1915, to the order of respondent who deposited it in his bank. On the fourteenth of May respondent drew his check to bearer for \$125 and received the currency therefor and delivered the same to Brown, who thereafter gave to the respondent a receipt, dated May fifteenth, purporting to be signed by Sherrock, for the \$125 in full settlement of his case. Sherrock subsequently made complaint to the grievance committee of the Association of the Bar stating that he had received but \$80 which he said had been paid to him in small amounts at different times. The grievance committee had various hearings at which the respondent appeared and finally filed these charges, the first charge being that respondent had converted his client's money to his own use. The learned official referee has reported that in his opinion this charge is not sustained, that respondent had sent \$125 to his client by Brown, and was justified in believing that his client had received the same. Upon a careful review of the testimony we accept this finding.

The second charge grows out of the conduct of the respondent during the course of investigation by the grievance committee. On March 16, 1916, there was a hearing before the grievance committee which was adjourned. On March twenty-first, the respondent called at the home of Sherrock and paid him twenty dollars and on March twenty-second he called again upon him and paid him fifty dollars. Under said date of March twenty-second Sherrock wrote the grievance committee a letter stating that he was mistaken in making charges against respondent and wished to withdraw the affidavits and dispose of the matter and also wrote to the respondent that he had so written to the grievance committee. On March twenty-third the respondent appeared before the grievance committee and testified, not under oath, that since the last meeting he had not settled with Sherrock, that he had not given to him, or promised to give to him, any money. Thereafter Sherrock having testified as to the receipt by him upon the two occasions of the twenty dollars and fifty dollars above referred to, on March thirtieth, the respondent again appeared before the grievance committee and reiterated his former testimony, stating that it was true and

App. Div.]

First Department, June, 1917.

testified as follows: "Q. Then all this story that he has told about the payment to him of \$20 and the further payment of \$50 is incorrect? A. Yes. Q. And you did not take any receipt from him? A. No, sir. Q. And you did not tell him that you would like to have him write a letter withdrawing the charge? A. No."

The learned official referee in his report states as follows:

"The respondent on the hearing before me testified in explanation of the false statements made by him before the Grievance Committee as follows:

"'There were many questions asked me there by several different members of the Committee, and I was somewhat panic-stricken, and it may be that some of those statements there are — that they are mis-statements, some of those answers. I did not look over the testimony there until after the proceeding was commenced. In looking it over I found some of them — I had made some misstatements. * * * I was very much nervous and worked up over the thing, over this proceeding. Q. Well, then, your best answer is that you were embarrassed on both the 23rd and the 30th? A. Yes, sir.'

"This testimony of the respondent cannot be accepted as a satisfactory explanation and justify his exculpation. Conduct for which a lawyer may be held to account to the court of which he is an officer is not necessarily limited to transactions in which the relations of attorney and client exist. The proceeding conducted by the Grievance Committee was quasi-judicial. The natural consequence of the false statements was to deceive and mislead the Committee, and should be held to have been made by the respondent for that purpose. It is conduct by a member of the Bar of a character that should not be permitted to pass unrebuked. It is my opinion that it constitutes misconduct that renders the respondent amenable to discipline by the Court."

It has been many times held by this court that disciplinary proceedings are instituted not for the purpose of adjusting differences between attorney and client or for forcing a settlement or bringing about the collection of moneys claimed to be due, but are solely for the purpose of maintaining the dignity and honor of the profession, disciplining unworthy members

thereof or vindicating them when unjustly accused. The purpose is to exercise the great and summary power of the court not for the benefit of a complaining individual but for the good of the community, and to uphold the administration of justice by securing decent and upright conduct by the officers thereof. It was, therefore, a serious breach of propriety for the respondent to attempt to interrupt the investigation of his conduct by the buying off of the complaining witness even though he might have felt the complaining witness was justly entitled to the moneys he paid to him because of Brown's dereliction of duty, if such there was, in failing to transmit to him the money given to him for that purpose. It was a greater breach of right conduct to endeavor to conceal that transaction from the grievance committee and to make false statements upon the hearing before it. The members of the committee were his professional brethren. They were examining into his professional conduct, not as prosecutors at that time but endeavoring preliminary to proceedings in court to ascertain whether there was fair and just ground for such proceedings. That committee not only presents cases to this court but in innumerable instances prevents the presentation of groundless and unsubstantial charges against members of the profession by its fair and thorough preliminary examination. The Association of the Bar of the City of New York was incorporated by the Legislature for the purpose, *inter alia*, "of maintaining the honor and dignity of the profession of the law" and "increasing its usefulness in promoting the due administration of justice." (Laws of 1871, chap. 819.) Its constitution provides for a committee on grievances which "shall be charged with the hearing of all complaints against members of the association and against attorneys practising in the First Judicial District or persons pretending to be attorneys or counsellors at law practising in the First Judicial District, and all complaints which may be made in matters affecting the interests of the legal profession, the practice of law and the administration of justice." It has long been the practice of this court to refer to said committee for investigation, in the first instance, complaints against members of the bar to see whether such complaints furnish sufficient ground for the submission of formal charges. Its work

App. Div.]

First Department, June, 1917.

has been of the most important character and has been of great assistance to the court. When so proceeding, as the learned official referee has well said, its acts are *quasi* judicial, for on its conclusions formal charges are presented to the court. Though not under oath before said committee, as a member of the bar, respondent was under the highest obligation, his professional conduct and character being under investigation, to be frank and honest. He was neither. He attempted to deceive by making false statements in regard to material matters then under consideration. This conduct threw grave doubt upon his defense of the principal charge and has caused us to examine the record in that regard with great care. While we have concluded to accept the conclusion of the learned official referee as to that charge, we also approve of his conclusion as to the second charge.

The respondent states in his brief that he is duly penitent, appreciates the seriousness of his offense and has already been severely punished.

In our opinion for the misconduct of which he has been found guilty he should be and hereby is severely censured.

DOWLING, SMITH, PAGE and SHEARN, JJ., concurred.

Respondent censured. Order to be settled on notice.

EDWARD SHAW, Respondent, v. THE ANSALDI COMPANY, INC., VERNON CASTLE and IRENE CASTLE, Appellants.

First Department, June 15, 1917.

Corporations — right of directors and officers to compensation — excessive salaries — right of directors to declare dividends as salaries — judgment creditor's action against directors — consideration for issuance of stock — disbursements not in violation of Stock Corporation Law, section 66, where corporation solvent — extent of liability of directors for impairment of capital stock in violation of Stock Corporation Law, section 28.

It is not unlawful for the sole stockholders of a corporation, who are also its directors, to take from its earnings a reasonable amount for their services, aside from their failure to pay in and retain unimpaired the capital stock.

Even when excessive salaries have been voted to themselves by said directors, but in good faith and without intent to defraud creditors, they may be allowed to retain such part thereof as will reasonably compensate them for their services for the performance of which others might have been employed.

In an action by a judgment creditor of a corporation who had sold property of the corporation on which he held a chattel mortgage, the interest on which had not been paid, resulting in a deficiency judgment, brought under sections 90 and 91 of the General Corporation Law to compel the officers and directors to account to a receiver to be appointed on the theory that disbursements of money made by the defendants to themselves, as salaries, which for that reason were voidable at the instance of the corporation, may be avoided by its creditors on the ground that the capital of the corporation was thereby impaired in violation of section 28 of the Stock Corporation Law, a judgment cannot be sustained under section 55 of the Stock Corporation Law, although the stock was issued without consideration, because a violation of said section was not alleged and the complaint was not so amended, and for the further reason that the liability of each of the defendants on that theory would be limited by section 56 of the Stock Corporation Law to the capital stock received by him.

The issuance of capital stock in consideration of services to be performed in the future is unauthorized by section 55 of the Stock Corporation Law.

A judgment in such an action cannot be sustained under section 66 of the Stock Corporation Law on the theory that all disbursements subsequent to default in paying interest on the plaintiff's mortgage after demand were in violation of the provisions of said section, where the company was not financially embarrassed when it made default.

Under chapter 354 of the Laws of 1901, amending what is now section 28 of the Stock Corporation Law, the liability of directors on the ground that the capital of the corporation has been impaired is confined to the loss sustained by the corporation or its creditors by the wrongful declaration and payment of dividends.

PAGE, J., and CLARKE, P. J., dissented, with opinion.

APPEAL by the defendants, The Ansaldi Company, Inc., and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of March, 1916, upon the decision of the court after a trial at the New York Special Term.

Charles H. Tuttle [*William Klein* with him on the brief], for the appellants.

Max L. Schallek [*Samuel Strasbourger* with him on the brief], for the respondent.

LAUGHLIN, J.:

The plaintiff brought this action as a judgment creditor of the defendant corporation to compel the individual defendants to account to a receiver to be appointed by the court, on the theory that as officers and directors of the company they distributed to themselves and to one Ansaldi, who was its president, the sum of \$32,999.99, in violation of their duty and of law, leaving the company without sufficient assets to satisfy the plaintiff's claim.

The prayer for relief follows the provisions of subdivision 2 of section 90 of the General Corporation Law (Consol. Laws, chap. 23; Laws of 1909, chap. 28) by demanding that the defendants account for any money and the value of any property which they have acquired to themselves or transferred to others or lost or wasted by violation of their duties as directors; but that the money for which they are liable be paid over to the *receiver* for the benefit of the company and its creditors instead of directly to the company or to its creditors as provided in the statute. The complaint clearly shows that the action is based on the provisions of said section 90 of the General Corporation Law, and was brought by a creditor by virtue of section 91 thereof. The judgment recovered is for the amount of a judgment recovered by plaintiff against the corporation and with interest thereon together with costs. The recovery, however, is in favor of the plaintiff, without the appointment of a receiver, and against the individual defendants for the amount of the judgment and interest together with costs, and against the corporation for costs only. The complaint was not amended. The learned counsel for the respondent contends in his points that the action was brought under said section 90 of the General Corporation Law and that the recovery is sustainable thereunder. The provisions of that section, so far as material here, are contained in subdivision 2, which, among other things, authorizes an action against officers or directors to recover a judgment, as follows: "Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties."

On the 7th day of November, 1913, the individual defendants and one Ansaldi entered into an agreement in writing for the formation of a corporation under the laws of New York, under the name under which the defendant company was subsequently incorporated, to operate a restaurant in that part of the Heidelberg Building at Broadway and Forty-second street then occupied and used as a restaurant by the Michaud Catering Company. It was provided in the agreement that the capital stock should be \$10,000, and that each should subscribe one-third, but that the odd share should be taken by Ansaldi, and that they should become the directors and would immediately on the organization of the company authorize it to take a lease of the premises according to the terms of an agreement in writing made at the same time between them and one McEwen as receiver, and that they would likewise authorize the execution of the necessary instruments to continue the life and validity of a certain chattel mortgage then covering the property in the restaurant executed by said Michaud Catering Company to the plaintiff; that Ansaldi should be the manager of the restaurant and that the individual defendants should dance therein and in no other restaurant or cabaret in New York city, every day that the restaurant should be open for business at hours to be agreed upon, and that all the stock should be immediately delivered to one Barth as trustee under a voting trust for the period of five years, upon condition that should any of them fail to render to the company the services agreed to be rendered, the stock of the party so failing should become the property of the others, and authority to decide whether the services were so rendered was given to the voting trustee. The agreement for the lease provided that the receiver should rent the premises to a corporation to be incorporated, under the name of the defendant company, for a term to commence on the 1st day of December, 1913, and to expire on the 1st day of May, 1930, at specified annual rentals payable in monthly installments on the first day of each month; and it recited that the individual defendants and Ansaldi had paid the rent for the month of December at the time of the execution of the agreement, and that they all assumed the liabilities then existing under the chattel mortgage on the

restaurant furniture and equipment held by the plaintiff. The company was incorporated on the 24th day of November, 1913, as contemplated, excepting that it was provided that the company should begin business with \$5,000, which was one-half of its capital stock, and the individual defendants and Ansaldi were represented in the incorporation by three others who were named as the directors for the first year. The first meeting of the incorporators was held on the fourth day of December. At that meeting the two agreements executed by the individual defendants and Ansaldi together with assignments thereof to the company were presented and accepted, and a lease from the receiver to the company as contemplated was presented and its execution was authorized. There was also presented a bill of sale from the plaintiff to the company and a chattel mortgage from the company to the plaintiff, and the bill of sale was accepted and the execution of the chattel mortgage was authorized. On the same day the directors met and resigned in turn and the individual defendants and Ansaldi were elected directors and the latter was elected president and treasurer, Mrs. Castle, vice-president and Mr. Castle, secretary, and the action theretofore taken by the incorporators was ratified, and it was resolved that the value of the contracts for the lease and for the organization of the company and the services agreed to be rendered by Ansaldi as manager and by the Castles as dancers was \$10,000, and that in consideration of said assignments the capital stock should be issued thirty-three shares to each of the Castles and thirty-four to Ansaldi. The capital stock was subsequently so issued without further consideration. It appears that the rent for the first month had been advanced for the Castles and Ansaldi by one Zimmerman and that it was repaid to him on the 7th day of December, 1913, from the earnings of the company. It was stipulated that the defendants were repaid from the earnings of the company any moneys paid out or advanced by them for it. The plaintiff, representing L. Barth & Sons, executed the bill of sale of the furniture and equipment of the restaurant to the company on or about the 4th day of December, 1913, and in consideration therefor it executed a chattel mortgage thereon to him

for \$47,251.16, which the evidence shows and the court found was the value of the property at that time. It was provided that the chattel mortgage should also cover any further equipment installed in the future, and that the company should make daily payments of \$33.34 on account of principal *during the months the restaurant was open*, and should pay interest on the principal on the last day of each month. These provisions plainly show that it was not contemplated that the restaurant should be open all the year. The company began business on the 4th day of December, 1913, and continued to operate the restaurant until the 30th day of April, 1914, during which time the individual defendants and Ansaldi remained its sole stockholders, directors and officers. At a meeting of the directors held on the 15th of December, 1913, a resolution was unanimously adopted providing that each of the three directors, officers and stockholders should, until further notice, receive a salary of \$500 a week to "cover all services as officers and such other services as shall be rendered to the company according to its needs," and on the 11th day of January, 1914, a resolution was unanimously adopted by the directors increasing their salaries to \$1,000 each per week after February 1, 1914. Pursuant to these resolutions each of the three directors, officers and stockholders drew the sum of \$10,833.33 for the period *prior to* April first, and Ansaldi drew the further sum of \$500 on account of expenses preliminary to the organization of the company. At the time the restaurant closed on April 30, 1914, the company had paid on account of principal on the indebtedness secured by the chattel mortgage the sum of \$4,900, which was all that had become due, but it made no payment of interest. The payment of interest due at the end of December was demanded shortly thereafter, and the payment of the interest which subsequently fell due was likewise demanded, but none of the interest was paid.

At the time the restaurant closed there was sufficient cash on hand to pay the current obligations; and all indebtedness of the company other than its indebtedness to the plaintiff secured by the chattel mortgage, with the exception of an item of \$23.87 for unclaimed wages, had then been paid. It was intended at the time to close the restaurant only for

App. Div.]

First Department, June, 1917.

the summer months and to open it again in the fall, but on the 3d day of September, 1914, the attorney for the company surrendered the keys and delivered possession of the plant and equipment to Barth, and the plaintiff having elected under the chattel mortgage to declare the whole amount due on account of non-payment of interest and the subsequent monthly installments of principal, sold the property covered by the mortgage at public auction, without bringing a foreclosure action, on the fourteenth of September, and bid in the property for the sum of \$20,000, which was the best price obtainable therefor, leaving a balance of \$22,557.36 of principal together with interest thereon due and unpaid on the mortgage debt, for which a judgment was subsequently recovered against the company. The judgment recovered in this action against the individual defendants is for the deficiency. The evidence shows that the ordinary depreciation in value of property such as was covered by the mortgage while in use is at the rate of ten per cent per annum, and that about twice that amount had been paid to apply on the principal prior to the closing of the business. It appears that the property covered by the chattel mortgage was not new when originally installed in this restaurant, but that it had been in use and had been sold by the plaintiff under chattel mortgages and purchased by him on two former occasions.

Notwithstanding the theory of the action as shown by the complaint, the contention is now made on evidence offered by the plaintiff and received without objection that the defendants received their stock without consideration, that all disbursements made after the demand for the payment of interest on the mortgage which fell due on the 31st of December, 1913, were in violation of the provisions of section 66 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), and that the withdrawal of money as salaries by the defendants and by Ansaldi by their authority constituted an *impairment of the capital* and rendered them liable jointly and severally under section 28 of the Stock Corporation Law for restoration of the entire amount drawn by them and by Ansaldi as salaries.

It is claimed in behalf of the appellants that the plaintiff was the only creditor, and the evidence shows not only that

he was the only judgment creditor, but that he was the only creditor with the exception of the small item for unclaimed wages. There is no evidence or finding of fraud or bad faith on the part of the defendants in voting for the distribution of the money as salaries or that the company was insolvent at any time until after it closed the restaurant and the plaintiff elected to declare the entire amount of the indebtedness due. It is to be borne in mind that there has been no distribution of any assets which the corporation had when it incurred the indebtedness to the plaintiff and there is no evidence that the distribution was not made in entire good faith and in the belief that the business would continue to be successful. If others had been employed to perform the services and had been paid therefor it could not be successfully maintained that such contracts and payments would have been illegal. Aside, therefore, from their failure to pay in and retain unimpaired the capital stock it was not unlawful for them to take from the earnings of the corporation a reasonable amount for their services the same as they might lawfully have paid to others. Even where excessive salaries have been voted to themselves, but in good faith and without intent to defraud creditors, by directors, they may be allowed to retain such part thereof as will reasonably compensate them for their services for the performance of which others might have been employed. (See *Carr v. Kimball*, 153 App. Div. 825; *affd.*, 215 N. Y. 634; *MacNaughton v. Osgood*, 41 Hun, 109. See, also, *Curran v. Oppenheimer*, 164 App. Div. 746.) On the assumption that the salary resolutions constituted declarations of dividends, as evidently was intended, still the defendants were authorized to declare dividends out of profits so long as they did not entrench on the capital and being the owners of all the stock they had a right to distribute the surplus profits. (See *Carr v. Kimball*, *supra*; *Hartley v. Pioneer Iron Works*, 181 N. Y. 73; *Groh's Sons v. Groh*, 80 App. Div. 85; *Morawetz Priv. Corp.* [2d ed.] § 440.) That rule of law is conceded, but it is claimed that it is not applicable here owing to the fact that no capital was paid in. That point will be considered after I discuss other questions.

The learned counsel for the respondent does not contend that the judgment may be sustained either on the theory

that the action is brought in the right of the corporation or in the right of the plaintiff individually as a creditor on account of the failure of the stockholders to pay for their stock in violation of section 55 of the Stock Corporation Law, or under section 66 thereof, for having distributed the moneys after defaulting in paying the interest on the mortgage; but he claims that the evidence showing the violations of those statutory provisions sustains the action under section 90 of the General Corporation Law.

It is manifest that the judgment cannot be sustained under section 55 of the Stock Corporation Law, not only for the reason that a violation of that section was not alleged and the complaint was not amended, but for the further reason that the liability of each of the defendants on that theory would in any event be limited by section 56 of the Stock Corporation Law to the capital stock received by him. (See *Ford v. Chase*, 118 App. Div. 605; *affd.*, 189 N. Y. 504; *Myers v. Sturgis*, 123 App. Div. 470; *affd.*, 197 N. Y. 526; *Jeffery v. Selwyn*, 220 *id.* 77.) It is quite clear under the authorities that the stock was neither issued for cash nor for property contributed by the stockholders, for the contracts which it is claimed afforded the consideration were expressly made for and inured to the benefit of the corporation upon its formation (*Avon Springs Sanitarium Co. v. Weed*, 119 App. Div. 566; reversed on dissenting opinion, 189 N. Y. 557; *Herbert v. Duryea*, 34 App. Div. 478; *affd.*, 164 N. Y. 595), and in so far as they provided for the rendition of services *in the future* by the three stockholders that element is not a consideration for which the issuance of capital stock is authorized by section 55 of the Stock Corporation Law. (*Stevens v. Episcopal Church History Co.*, 140 App. Div. 570; *Morgan v. Bon Bon Co., Inc.*, 165 *id.* 89.) But the defendants were entitled to litigate those questions and any others on which their liability to answer therefor depends and such issues were not presented for litigation by the pleadings. While, therefore, apparently the stock was issued without consideration, for the reasons assigned the judgment as entered cannot be sustained, nor can it be sustained for any amount on that theory. (See *Curran v. Oppenheimer*, 164 App. Div. 746.)

I am also of opinion that the judgment cannot be sustained

under section 66 of the Stock Corporation Law on the theory that all disbursements subsequent to the default in paying the interest on the mortgage after demand were in violation of the provisions of that section. Said section 66 provides, among other things, as follows: "No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. * * * Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation." The other provisions of that section expressly relate to transfers of property of a corporation which is insolvent or the insolvency of which is imminent and that was not the case here. In *Caesar v. Bernard* (156 App. Div. 724, 732) we held that the provisions of section 66 were enacted "to prevent those occupying confidential and fiduciary relations toward corporations from profiting directly or indirectly by information thereby acquired, and to prevent unjust discrimination and preferences among creditors of insolvent corporations, or those bordering on insolvency," and the Court of Appeals affirmed on our opinion (209 N. Y. 570). That section has, therefore, I think, been authoritatively construed as relating to corporations which are financially embarrassed or in danger of so becoming. This company was not financially embarrassed when it made default in the payment of interest on the mortgage. Down to the time it closed the restaurant business for the summer it had sufficient funds with which to pay the interest and all other current obligations and only became financially embarrassed when it suspended business and the plaintiff elected to declare the entire indebtedness due and payable. Nor is there any evidence of a *refusal* to pay the interest. It merely appears that the interest was demanded from time to time and that Ansaldi promised to pay it but failed so to do. It cannot

be that this section is to be construed literally as rendering *illegal* every disbursement by a solvent corporation after it has failed to pay an obligation falling within the provisions of the statute. Not only was the action not brought under that section, but it could not be maintained thereunder for the further reason that the liability of directors for disbursing moneys and transferring property in violation of the provisions of that section is given to the creditors and stockholders and is limited to the *loss* sustained by the acts of the directors in violation of the statute. I see no basis for sustaining this judgment on the theory that the plaintiff as a creditor of the corporation sustained a loss equal to the amount of this judgment owing to the distribution of the money as salaries, if such distribution was unauthorized only on the ground that the corporation had failed to pay the interest on the mortgage, for on that theory the distribution would have been lawful, if the comparatively small amount of interest due at the respective times had been paid. (See *Curran v. Oppenheimer*, *supra*.)

The recovery, therefore, if sustainable at all, must be sustained on the theory on which the action was brought, namely, that these disbursements of money made by the directors to themselves as salaries, which for that reason were voidable at the instance of the corporation, may be avoided by its creditors on the ground that the capital of the corporation was thereby impaired in violation of the provisions of section 28 of the Stock Corporation Law, which are as follows: "The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its

creditors respectively by reason of such withdrawal, division or reduction." The statute was so amended by chapter 354 of the Laws of 1901, which amended section 23 of the former Stock Corporation Law (Gen. Laws, chap. 36; Laws of 1892, chap. 688). I am of opinion that by that amendment a material change was made in the law, for prior thereto the directors were expressly made liable to the corporation and to its creditors for the full amount of "the capital of such corporation so divided, withdrawn, paid out or reduced." It may well be that under the former statute the directors would be liable for the restoration of the full amount of the dividends, but by the amendment I think their liability is confined to the loss sustained by the corporation or its creditors from the declaration and payment of the dividend. No case is cited and I have been unable to find any construing the provisions of the former law or of the statute as it now exists on the precise point as to whether at the time of the declaration and payment of dividends a dividend in some amount would have been authorized, but not to the extent declared. It would, I think, be an unreasonable construction to hold that if directors, acting in good faith and in the belief that the surplus earnings of the corporation warranted it, should declare a dividend amounting to \$10,000, which impaired the capital only to the extent of \$5,000, they should be compelled to restore the entire amount of the dividend declared. I am of opinion that the purpose of the statute would be subserved in such case by requiring them to restore sufficient of the amount of the dividend declared and paid to make good the impairment of capital. If that be the true construction of the statute, then this judgment cannot be sustained. On the theory that the action is not brought and cannot be sustained as an action to recover the amount of capital which the defendants were obligated to pay on receiving their shares of stock and failed to pay, but merely on the ground of unauthorized dividends, then I think the only importance of their failure to pay for their capital stock is that they were obliged at each time of declaring dividends to leave sufficient from the earnings of the corporation to make good the capital as if they had paid it in. On that theory an accounting is necessary, for the evidence does not show either the value of the assets or the

App. Div.]

First Department, June, 1917.

amount of the liabilities at the respective times when the weekly salaries were paid. The assets and liabilities were only shown by the books and records of the corporation at the end of each month, and it appears by the assets and liabilities thus shown that the entire disbursements for salaries to the directors, officers and stockholders for one month only wholly intrenched on capital and for the other months a surplus was left for capital, but not to the extent of \$10,000; and it does not appear that the intrenchment on capital for the entire period aggregated the amount of the recovery. If it did, since there is no other judgment creditor and no objection was taken that the rights of other creditors were involved, a direct recovery in favor of the plaintiff might be sustained. (*Buckley v. Stansfield*, 155 App. Div. 735; *affd.*, 214 N. Y. 679; *Cullen v. Friedland*, 152 App. Div. 124; *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99.)

It follows, therefore, that the judgment should be reversed, with costs, and that any findings inconsistent with the views herein expressed should be reversed, and appropriate findings in accordance with these views should be made directing an accounting before a referee to be appointed by the order of this court which should be settled on notice.

SCOTT and SMITH, JJ., concurred; CLARKE, P. J., and PAGE, J., dissented.

PAGE, J. (dissenting):

This action was brought by a judgment creditor of the corporation defendant to compel the individual defendants, directors of the corporation, "to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge" and also to compel them to pay to the corporation or to its creditors, "any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties." (Gen. Corp. Law, § 90, subs. 1, 2.)

The bringing of this action by a creditor of the corporation

is expressly authorized by statute. (Gen. Corp. Law, § 91.) When such an action is brought by a creditor it has been held that it is "in the nature of a creditor's bill, a search and trace by a diligent judgment creditor for and the enforcement of an equitable lien upon the assets of the corporation that have been distributed by the trustees in violation of law." (*Shalek v. Jetter*, 171 App. Div. 364.) In the instant case it appears by stipulation that, although the individual defendants and Ansaldi subscribed for \$10,000 par value of the stock, the same was issued to them without their paying or giving anything therefor, thus violating section 55 of the Stock Corporation Law. It was further stipulated that they voted to pay themselves in the guise of salaries, but which it is conceded must be treated as dividends, substantially all the net cash receipts of the corporation so long as it conducted business, thus violating section 28 of the Stock Corporation Law, even if the position of Mr. Justice LAUGHLIN is sound that the capital could be made up out of earnings, for the payment to the directors each month reduced the unpledged assets below the limit of \$10,000. I do not accept his conclusion that unpaid subscriptions to stock may be paid out of surplus profits, for capital stock of a corporation does not mean its share stock but a fund required to be paid in and kept intact as a basis of the business enterprise and the chief factor in its safety. (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 439.) "It is the established law of this State that the capital of a corporation is regarded as a substitute for the personal liability which subsists in private ownerships and as a fund set apart and pledged for the payment of its debts." (*Hazard v. Wight*, 201 N. Y. 399, 402.) Until this fund was created the declaration of any dividends would be illegal and a violation of the director's duty for which he would be personally accountable.

To say that surplus profits may be appropriated to the payment of stock subscriptions violates a fundamental distinction; profits are first to be appropriated to pay debts and thus constitute a fund in addition to capital. The payment of the subscription of the shareholder out of the profits of the corporation is an appropriation of the money of the corporation to pay the individual debt of the stockholder.

App. Div.]

First Department, June, 1917.

Furthermore it was proved without objection that before the payment of these dividends the corporation had failed to pay installments of interest due, on the chattel mortgage held by the plaintiff's assignor, although payment thereof had been duly demanded, thus violating section 66 of the Stock Corporation Law.

Mr. Justice LAUGHLIN states these various violations but holds that relief cannot be given for the reasons, *first*, that specific remedies are provided in those sections which the plaintiff must invoke, and *second*, that the facts are not sufficiently alleged in the complaint.

In this, in my opinion, the theory of the action is misapprehended. An action under section 90 of the General Corporation Law is to compel the director to account for his violation of duty. Allegations of several violations do not constitute separate causes of action, but are merely additional specifications of the primary duty violated and give rise to but one cause of action. In this action relief will be given even though for some of the specific acts there exist other and different remedies, even if for some an adequate remedy at law is provided. (*Moran v. Vreeland*, 81 Misc. Rep. 664, 672; *affd.*, 162 App. Div. 907, and cases cited.)

In the instant case the complaint contains a prayer for general relief, an answer was interposed, and the facts were either stipulated or proved without objection. Therefore, although the complaint may be justly criticized, yet the facts proved are not in hostility to the cause of action alleged and all might have been properly embodied in the complaint. This case, therefore, comes within the rule declared by the Court of Appeals. "While the complaint is not as full as it should be, still the plaintiffs were entitled to relief upon the facts alleged, and if it had been amended so as to conform to the proof, all deficiencies would have been supplied. There was a prayer for general relief and, after an answer has been interposed, any judgment may be awarded that is warranted by the facts proved and consistent with the facts alleged, even if it does not precisely conform to the pleader's theory of the action, provided it is not hostile thereto." (*Rogers v. N. Y. & T. L. Co.*, 134 N. Y. 197, 219.)

The plaintiff is the only creditor and the amount wrongfully

taken from the corporation by these defendants is more than sufficient to pay the plaintiff's claim; therefore, there was no necessity for an accounting or the appointment of a receiver.

The judgment should be affirmed, with costs.

CLARKE, P. J., concurred.

Judgment reversed, with costs, and accounting ordered before a referee as directed in opinion. Order to be settled on notice.

WILLIAM THORNTON and Others, as Trustees of the Creditors and Stockholders of VAN KEUREN AND THORNTON COMPANY, Plaintiffs, v. NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND-AMERICA LINE), Defendant.

First Department, June 15, 1917.

Corporations — when indorsee of check drawn by treasurer of corporation payable to his own order is put on inquiry as to treasurer's authority — liability of corporation on check drawn by treasurer payable to his own order — duty of bank having deposit of corporation to inquire as to the authorization of treasurer to draw checks — negligence of corporation in failing to audit canceled checks.

Where the treasurer of a corporation, by a resolution of its board of directors, was "empowered to execute contracts or other obligations, sign or endorse checks, notes or drafts, and otherwise perform the usual duties pertaining to the office of treasurer," and a copy of said resolution was on file with the bank where the corporation had its account, and on May fifth of the same year the treasurer applied at the office of a steamship company for a passage ticket on one of its steamships to sail August thirteenth, for a party of several persons, and made a deposit, and on June fifteenth delivered to the steamship company in payment of the balance for the ticket a check of the corporation for \$500 drawn upon its bank by himself as treasurer, payable to his own order and indorsed by him to the order of the steamship company, and said company did not make any inquiry of the corporation as to the business and purpose for which said check was used by its treasurer, further than to make a prompt presentation thereof to the bank upon which it was drawn, and no demand for the return of the money represented by said check was made upon the steamship company until May 16, 1916, said company was put

on inquiry as to the treasurer's authority to negotiate the check in payment of his personal indebtedness, not because it was payable to his own order, but because the circumstances clearly indicated that the transaction was for his personal benefit and because said company participated in the diversion by using the check in its own business and for its profit. But since the corporation permitted its canceled checks to be returned to the treasurer who drew them, and since if they had been properly audited the diversion would have been discovered in time to enable the company to cancel the ticket, the corporation, its negligence having enabled the dishonest treasurer to perpetrate the fraud, must stand the loss.

A bank is not bound to inquire for the authorization of the treasurer of a corporation to draw the corporation's check to his own order when there is on file with it a resolution of the board of directors of such corporation giving the treasurer the usual general authority to draw and indorse checks.

Where there are any circumstances indicating that a check is being used or is intended to be used for the officer's personal benefit, or where the bank in any way participates in the diversion to its own benefit, the duty of inquiry exists, but the rule should not be unreasonably extended so as to clog business, especially since corporations may easily protect themselves by strictly limiting the authority given to draw and indorse their checks.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Henry F. Atherton, for the plaintiffs.

John A. McManus, for the defendant.

SHEARN, J.:

The salient agreed facts in this submitted controversy are these: During the year 1910, the Van Keuren & Thornton Company, a domestic corporation, was engaged in the business of buying, selling and converting cotton fabrics, its principal place of business being at 20 Thomas street, borough of Manhattan. The company's treasurer was one Vanderoef, who by resolution of the board of directors was "empowered to execute contracts or other obligations, sign or endorse checks, notes or drafts, and otherwise perform the usual duties pertaining to the office of treasurer." A copy of the resolution was on file with the Corn Exchange Bank of New York city, where the company had its account. On May 5, 1910, Vanderoef applied at the office of the steamship company for a passage ticket from Rotterdam to New York on one of its steamships to sail August 13, 1910, for a Mrs. Johnson

and party of three persons. At this time he made a deposit of \$100 in cash on account of the purchase price of the ticket, which was \$600. Subsequently, on May 23, 1910, by a letter upon which were engraved the words "20 Thomas Street," which letter was signed "P. G. Vanderoef," the steamship line was advised of the names of the persons for whom the passage was desired. On June 15, 1910, Vanderoef delivered to the steamship company in payment of the balance of the purchase price of the ticket a check of the Van Keuren & Thornton Company for \$500, drawn upon the Corn Exchange Bank by himself as treasurer, payable to his own order, which he indorsed to the order of the steamship company. On the same day the check was deposited by the steamship company to its account in the Produce Exchange Bank, and on June 17, 1910, it was paid by the Corn Exchange Bank out of the funds of the Van Keuren & Thornton Company. On August 13, 1910, the steamship line accepted Mrs. Johnson and party as passengers on its steamship *Nieuw Amsterdam* at Rotterdam and transported them to New York. The steamship company did not make any inquiry of any officer, agent or director of the Van Keuren & Thornton Company as to the business and purpose for which said check was used by Vanderoef further than to make a prompt presentation thereof to the bank upon which it was drawn in the usual course. At the time of the drawing of the said check Vanderoef was in good standing in the business community, but in December, 1911, he confessed to the crime of grand larceny of various sums of money from the Van Keuren & Thornton Company and was subsequently sentenced to imprisonment for a term of years in Sing Sing prison. No demand for the return of the money represented by this check was made upon the steamship line until May 16, 1916.

Plaintiffs are right in their contention that the defendant was put on inquiry as to Vanderoef's authority to negotiate the check in payment of his personal indebtedness; not, however, because the check was payable to his own order, but because the circumstances clearly indicated that the transaction was for Vanderoef's personal benefit and because the defendant participated in the diversion by using the check in its own business and for its profit. (*Ward v. City Trust Co.*,

192 N. Y. 61; *Bischoff v. Yorkville Bank*, 218 id. 106.) Defendant contends, however, that if any duty of inquiry existed, it sufficiently performed its duty when it presented the check to the Van Keuren & Thornton Company's bank for collection, citing *Havana Central R. R. Co. v. Knickerbocker Trust Co.* (198 N. Y. 422). That case is essentially different, for the Knickerbocker Trust Company, whose position is claimed to have been similar to that of this defendant, did not receive the unauthorized check from the wrongdoer in payment of his debt to it, a transaction suspicious on its face, unusual and clearly requiring express authorization. Furthermore, the defendant would only be entitled to benefit by such inquiries as the paying bank was bound to prosecute, and it cannot be said that a bank is bound to inquire for the authorization of the treasurer of a corporation to draw the corporation's check to his own order when there is on file with the bank a resolution of the board of directors of such corporation giving the treasurer the usual general authority to draw and indorse checks. A corporation's business might frequently require checks to be drawn to the order of one of its officers. Where, for example, an officer traveled as a purchasing agent and required large sums of money for such purposes, certified checks to the order of the officer, readily cashed in any business community, would be a safe and natural way of carrying money to be used in the company's business. It would be an intolerable burden on business to require an inquiry to be prosecuted as to the purposes or legitimacy of the transaction before a bank would be authorized to honor a check, either by payment or certification, entirely regular upon its face and signed by a duly authorized officer. Where there are any circumstances indicating that the check is being used or is intended to be used for the officer's personal benefit, or where the bank in any way participates in the diversion, to its own benefit, the duty of inquiry exists, but the rule should not be unreasonably extended so as to clog business, especially where it is so easy for corporations to protect themselves by strictly limiting the authority given to draw and indorse their checks. Therefore, the defendant can claim no benefit by relying upon the possible results of an inquiry which the paying bank was not obligated to make.

Nevertheless, the facts in this particular case are such as to prevent the plaintiffs from recovering. The passage ticket would never have been issued but for the negligence of the Van Keuren & Thornton Company. It will be noted that while the check was delivered to the defendant on June fifteenth, the passage purchased was for August thirteenth. Although the circumstances were such as to put the defendant on inquiry, it might naturally have assumed that if the transaction were in fact unauthorized, Vanderoef's lack of authority would develop long before the passage ticket would become effective. So it would have, if the Van Keuren & Thornton Company had employed ordinary safeguards in auditing or checking up its treasurer's accounts. This company permitted its canceled checks to be returned to the treasurer who drew them. In such case ordinary business prudence required that some other person should examine them. On or about July 1, 1910, the Van Keuren & Thornton Company's pass book in the Corn Exchange Bank was balanced and the canceled check dated June 15, 1910, was returned to the company. If these checks had been properly audited at any time within seven weeks thereafter, the diversion would have been discovered in time to enable the defendant to cancel the ticket. Apparently no system of audit was employed, for the fact of the diversion was not discovered until December of the following year. Both parties being innocent, this is a proper case to lay the loss on the party whose negligence enabled the dishonest treasurer to perpetrate the fraud. Accordingly the defendant is entitled to judgment dismissing the case upon the merits.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment ordered for defendant as stated in opinion. Order to be settled on notice.

App. Div.]

Second Department, June, 1917.

CHARLES E. BIRCH, Respondent, v. ANNA S. SEES, Appellant.

Second Department, June 8, 1917.

Evidence — expert testimony — when medical witness may stipulate for compensation.

If a medical witness or other witness with technical qualifications goes beyond mere testimony as to facts observed by the senses and is asked to draw a technical inference or conclusion, he may properly stipulate for compensation.

Hence, where an attending physician of the deceased, having testified on a prior trial as an expert witness for the proponent of the will, at an agreed compensation, was thereafter employed by a succeeding attorney for the proponent at the same terms to go over the witness' records to prepare himself so as to give expert testimony on the issue of the deceased's mental soundness, such agreement for compensation may be enforced.

APPEAL by the defendant, Anna S. Sees, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 20th day of October, 1916, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 28th day of October, 1916, denying defendant's motion for a new trial made upon the minutes.

This suit grew out of the proceedings for probate of the will of Dr. Walter E. Delabarre, in which there have been three jury trials. Plaintiff was a physician, who had attended deceased in his last illness, with whom he also had a life-long acquaintance. On the first trial plaintiff had been employed and paid by defendant's attorney at the rate of \$50 per day while attending court. This action was for like compensation on the second and third trials, in which the defendant here had been represented by a different attorney. The jury found for plaintiff for \$500 and interest.

John B. Doyle, for the appellant.

Henry C. Henderson, for the respondent.

PER CURIAM:

We must take it as established by this verdict that the plaintiff, an attending physician and a life-long acquaintance

of deceased, having testified on a prior trial as an expert witness for the proponent, at an agreed compensation of fifty dollars per day, was thereafter employed by a succeeding attorney for the proponent at the same terms, to go over the witness' records to prepare himself so as to give expert testimony on the issue of the deceased's mental soundness, which he did on two trials. It is, however, objected that as plaintiff had been the attending physician, his testimony was not that of an expert, and that such agreement for compensation should not be enforced. It seems settled that if a medical witness, or other witness with technical qualifications, goes beyond mere testimony to facts, observed by the senses, and is asked to draw a technical inference or conclusion, he may properly stipulate for compensation. (*People v. Montgomery*, 13 Abb. Pr. [N. S.] 207, 240; *Barrus v. Phaneuf*, 166 Mass. 123. See *Chamberlayne Ev.* § 2371.)

The facts in the case at bar are, therefore, within the permissive rule. The judgment and order should, therefore, be affirmed, with costs.

JENKS, P. J., STAPLETON, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order unanimously affirmed, with costs.

MARGARET A. THOMPSON, Appellant, v. WILLIAM A. THOMPSON, Respondent.

Second Department, June 8, 1917.

Husband and wife — agreement by husband to pay wife a certain sum per month executed prior to divorce — specific performance — adequate remedy at law.

A plaintiff divorced from her husband in another State is not entitled to enforce by specific performance an agreement made after the parties separated and before the divorce whereby the defendant agreed to pay her for her life or until her remarriage, a certain sum per month, as she has an adequate remedy at law.

APPEAL by the plaintiff, Margaret A. Thompson, from an order of the Supreme Court, made at the Westchester Special

App. Div.]

Second Department, June, 1917.

Term and entered in the office of the clerk of the county of Westchester on the 24th day of January, 1917, granting defendant's motion for judgment on the pleadings, consisting of a complaint and the answer thereto.

Xenophon P. Huddy, for the appellant.

W. Cleveland Runyon, for the respondent.

PER CURIAM:

The plaintiff, divorced from her husband in the State of Pennsylvania, would enforce specific performance of an agreement made after the parties separated and before the divorce, whereby the defendant agreed to pay her for her life or until her remarriage a sum of money measured by his income, but never less than \$75 per month, or if his income became less than \$2,700, then one-third of his income. The court will not enforce specific performance merely to save a multiplicity of suits (*Town of Venice v. Woodruff*, 62 N. Y. 462, 470), or because the defendant's exempt property cannot be taken on execution or to enforce an agreement such as that in question. (*McGean v. Parsons*, 150 App. Div. 208; *Buttlar v. Buttlar*, 57 N. J. Eq. 645.) It is no longer necessary to resort to equity, as the plaintiff has an adequate remedy at law. (*Winter v. Winter*, 191 N. Y. 462.) So far as *Fleming v. Peterson* (167 Ill. 465) tends to sustain appellant's view, it is not approved.

The order is affirmed, without costs.

JENKS, P. J., THOMAS, STAPLETON, MILLS and RICH, JJ., concurred.

Order affirmed, without costs.

DANIEL M. GERARD, Respondent, v. CROSS & BROWN COMPANY, Appellant.

Second Department, June 8, 1917.

Pleading — principal and agent — sufficiency of complaint in action by real estate broker against another broker for commissions — equitable claim upon quasi or constructive contract.

A complaint which, in effect, alleged that the plaintiff, a real estate broker, was employed by the owners of realty to effect a sale thereof upon agreement for five per cent commission; that he listed the property for sale with the defendant, another real estate broker, under an agreement to allow him two and one-half per cent of the commission for effecting a sale, and that the latter broker procured a purchaser and upon notifying the owners received the five per cent commission, states a claim in equity upon a *quasi* or constructive contract for the two and one-half per cent commission.

THOMAS and PUTNAM, JJ., dissented.

APPEAL by the defendant, Cross & Brown Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 4th day of December, 1916, overruling a demurrer to the complaint.

Edwin L. Ryon, for the appellant.

Frederick W. Sparks, for the respondent.

JENKS, P. J.:

I think that the Special Term was right in overruling the demurrer that the complaint did not state facts sufficient to constitute a cause of action. The plaintiff complains that he is a real estate broker employed by the owners of realty to effect a sale of it, upon agreement for 5 per cent commission; that he "listed" the property "for sale" with the defendant, a real estate broker, accompanied by a letter to the defendant, dated December 14, 1915, wherein plaintiff wrote that he was the exclusive agent, that he would receive any offer that the defendant would make and put it before the owners, and added: "In case you can effect a sale,

App. Div.]

Second Department, June, 1917.

will allow you 2½% commission;" that thereupon the defendant wrote on December 15th, in answer: "We beg to acknowledge receipt of yours of the 14th instant, relative to the block between Thompson and Nott Aves. and Rawson and Hill Streets, Long Island City, and note price of \$150,000. We beg to assure you that we will use our best efforts to dispose of this property, and will be glad to submit any offers that we may receive." Plaintiff further complains that defendant, while said property was listed with it under the terms of said letter of December 14th, procured a purchaser, submitted his offer to the owners of the property with the result of a sale, and that the owners thereupon paid 5 per cent commission to the defendant. He sues to recover the excess of the 5 per cent over the 2½ per cent.

I think that we can spell out from the pleading a charge that the defendant agreed with the plaintiff that the defendant would strive to effect a sale of the property and that defendant would submit any offer that it might receive therefor to the plaintiff, on the consideration that the plaintiff would pay the defendant 2½ per cent commission in the event of a sale, but that the defendant, in violation of its agreement, submitted such an offer to the owners and as the result has secured 5 per cent commission therefor. I think that the plaintiff, beyond the peril of this demurrer, has pleaded a suit in equity upon a *quasi* or constructive contract, sometimes called an implied contract. In the language of KENT, J., in *Neilson v. Blight* (1 Johns. Cas. 205, 210): "The law will infer a promise by the defendant to pay the money, because in justice and good faith he was bound to do so, and gave the plaintiff reason to expect it."

The interlocutory judgment is affirmed, with costs, with leave to the defendant to plead over within twenty days upon payment of costs.

STAPLETON and BLACKMAR, JJ., concurred; THOMAS and PUTNAM, JJ., dissented.

Interlocutory judgment affirmed, with costs, with leave to defendant to plead over within twenty days on payment of costs.

JACQUES LEBAUDY, Appellant, *v.* CARNEGIE TRUST COMPANY
and EUGENE LAMB RICHARDS, as Superintendent of Banks
of the State of New York, Defendants.

WILLIAM M. K. OLCOTT, Respondent.

First Department, June 8, 1917.

**Lien — attorney's lien on proceeds of judgment in hands of city
chamberlain — extent of lien — practice — reference.**

In fixing the lien of an attorney on funds, the proceeds of a judgment, in the hands of the chamberlain of the city of New York it is improper to include moneys due to another attorney, not an attorney of record, which have not been paid over to said attorney by the petitioner, or to include sums representing disbursements in collateral matters. In such case the matter will be remitted to a referee to ascertain what parts of the disbursements were incurred in the action for which the plaintiff is entitled to a charging lien.

APPEAL by the plaintiff, Jacques Lebaudy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of December, 1916, fixing the lien of the respondent, plaintiff's former attorney, at the sum of \$6,730.

Edwin T. Murdoch, for the appellant.

Walter E. Ernst, for the respondent.

PER CURIAM:

Petitioner has obtained a lien upon a fund now in the hands of the city chamberlain, the proceeds of a judgment recovered in behalf of the plaintiff in an action against the Carnegie Trust Company. The fund, not being in the petitioner's hands, is only subject to a charging lien of the attorney of record in the action in which the fund was recovered. (*Matter of Heinsheimer*, 214 N. Y. 361.) Of the lien established by the order appealed from, \$5,060 was for moneys not due to the petitioner but to one Conner, an attorney living in Paris, not an attorney of record in the Carnegie Trust Company case. From the evidence it appears that this amount has not been paid by the petitioner to Conner, nor is the petitioner liable to Conner for any part of the same. To this extent, therefore, the lien would seem to be

App. Div.]

First Department, June, 1917.

unauthorized. In addition to this amount there is included in the final order \$1,670, representing the balance of an account kept from the beginning of the relations between Olcott and this plaintiff, which included not only the services and disbursements in the Carnegie Trust Company matter, but in several other matters. Just what part of this amount represented disbursements in the case against the Carnegie Trust Company does not appear by the evidence.

The final order, therefore, must be reversed and the matter remitted to the referee to ascertain what part of these disbursements were incurred in the action of Lebaudy against the Carnegie Trust Company, for which amount the plaintiff is entitled to a charging lien, with costs to appellant to abide the final event. The fourth finding of fact by the referee to the effect that there is due from plaintiff to Olcott \$6,730 for fees and expenses in this action is reversed.

Present — CLARKE, P. J., DOWLING, SMITH and PAGE, JJ.

Order reversed and matter remitted to referee as stated in opinion, with costs to appellant to abide event. Order to be settled on notice.

BURNS BROS., Appellant, v. THE CITY OF NEW YORK,
Respondent.

First Department, June 8, 1917.

Water and water rights — easements of riparian owners in lands in the city of New York formerly under water — action of ejectment — respective rights of sovereign and riparian owners — grant of sovereign rights to city of New York — rights of city to said lands under water similar to those of State — city may not appropriate easements of riparian owners except by eminent domain — effect of construction of wharves by riparian owners under municipal permit — when such construction no basis for title by adverse possession — ejectment does not lie where parties have mutual rights in same premises.

Prior to the enactment of chapter 285 of the Laws of 1852 an owner of uplands abutting upon the Harlem river between the present One Hundred and Sixth and One Hundred and Seventh streets in the city of New York had an easement in the adjacent lands under water of passage

to and fro to land boats and merchandise, and for that purpose to construct docks or piers thereon. The State held the title in fee to the lands under water, subject to this easement, but vested with the power in its governmental capacity to improve the waters for the purpose of navigation to the detriment of the rights of the upland owner, for the reason that there are certain rights of navigation and commerce by water which are common to all.

When by the enactment of the statute aforesaid the people of the State granted its rights in said lands under water to the city of New York and authorized the establishment of Exterior street, so called (a street not yet completed), but reserved to upland proprietors a pre-emptive right to all grants which might be made by the State of said lands under water, the city as grantee of the State and vested with the fee held the lands in trust for the public for the promotion of commerce and general welfare, subject, however, to the easements of riparian owners. The permission to lay out Exterior street did not give to the city the right to take without compensation the easements of riparian proprietors as this would be beyond the constitutional power of the Legislature.

When the city of New York under legislative authority established the bulkhead line of the Harlem river, as shown upon the Southard map, and subsequently in 1865 granted in fee to McCaddin, the owner of uplands between the present One Hundred and Sixth and One Hundred and Seventh streets, lands under the waters of the Harlem river in front of his uplands upon the condition that the grantee, or his heirs and assigns, should construct good and sufficient bulkheads on the established line and fill in behind the same at his own cost and expense and keep in repair such streets and avenues as were then or might thereafter be laid out through said premises, which deed expressly provided that the use of the names One Hundred and Sixth and One Hundred and Seventh streets and other avenues was solely for the purpose of description and that the grantor reserved said streets to itself, the fee of the lands formerly under water between Exterior street and Avenue A remained in the city.

But, even though the city of New York retains the fee in said lands, it does not follow that it is entitled to a judgment of ejectment as against the successors of McCaddin holding under mesne conveyances from him, for as riparian owners they have easements in the lands formerly under water to the limit of the bulkhead line and they and their predecessors had a right to construct such docks and bulkheads as were necessary to the enjoyment of such easements of which they could only be deprived by an exercise of eminent domain for a public purpose upon the payment of compensation.

Hence, where there is no claim that the present owners or their predecessors in title have in any way failed to perform the covenants in the grant by the city to them and their easements have not been taken by eminent domain, they cannot be ejected from the lands formerly under water merely because the city is the owner of the fee thereof, for such ownership is in trust merely and can only be exercised in the interest of the

App. Div.]

First Department, June, 1917.

public and in the execution of the trust, especially so where the grant by the city was made upon the payment of a valuable consideration.

However, when the Legislature by chapter 105 of the Laws of 1868 authorized the abandonment of Exterior street for the uses designated in the act of 1857, and under the authority of said former statute the city of New York gave permission to the proprietors of water grants to erect piers and wharves within the bulkhead line, and a grantee of said McCaddin, pursuant to municipal permission, actually constructed such wharves, his successors are not entitled to succeed in an action of ejectment against the city of New York upon the theory that they have acquired title to the lands formerly under water by adverse possession. This, because the erection of such wharves was not an assertion of a hostile claim of title to the premises, for the grantees remained in possession under a known title derived from the city by the grant to McCaddin.

A title by adverse possession only arises from long-continued use or possession when a man can show no other title or right of possession, the law implying a grant from the fact of a continued use or possession without objection. If other title or right of possession can be shown no right in the premises adverse to that right or title will be implied from possession. The possession or use will be held to be under the known title.

Thus, the mere statement of an unfounded claim by one in lawful possession cannot change the character of his possession nor impose any obligation on the other party to alter his position in relation thereto.

As both of the parties to this action have rights in the property which they may continue to hold and enjoy, neither is in a position to eject the other therefrom.

APPEAL by the plaintiff, Burns Bros., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of November, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 20th day of November, 1916, denying plaintiff's motion for a new trial made upon the minutes.

The judgment determined that defendant is the owner in fee simple and entitled to possession to certain real property and directed that it be let into the possession thereof.

Charles E. Hughes, for the appellant.

Charles J. Nehrbas, for the respondent.

PAGE, J.:

The action is brought pursuant to the provisions of section 1638 *et seq.* of the Code of Civil Procedure, to compel the determination of a claim to certain real property bounded

northerly by the south side of One Hundred and Seventh street; easterly by the Harlem river; southerly by the northerly side of One Hundred and Sixth street and westerly by what would be the easterly line of Avenue A, if said avenue were physically laid out. These premises are entirely within the limits of Exterior street as designated upon the Southard map, but never physically laid out or used as a street. The plaintiff claims title in fee simple absolute by virtue of an adverse possession, and demands judgment that the defendant be barred from all claim to any estate, right, title, interest, lien, claim or demand in, to or upon the premises. The defendant denies the plaintiff's title and pleads its own title in fee simple absolute, and demands judgment that the complaint be dismissed; that the defendant is seized of and entitled to the possession of the premises, and that the plaintiff be barred from any estate, right, title, interest, easement, lien, claim or demand in, to or upon the property hereinbefore described except easements of light, air and access. Thus there is put in issue all the rights in these premises and the judgment of the court is invoked to determine the respective rights of the parties in the premises. In the case of *Consolidated Ice Co. v. Mayor, etc.* (166 N. Y. 92, 100) the court, speaking of a similar action, said: "An action is not maintainable for the purpose of obtaining an adjudication that a plaintiff has easements or rights of any character in the lands of another, and where the conclusion that the plaintiff had failed to prove such facts as would entitle it to maintain an action under the statute, was reached by the court, it was its duty to dismiss the complaint, instead of holding it and attempting to give a kind of relief for which the statute does not authorize the maintenance of an action." In that case, however, the defendant did not plead its title and demand that the judgment should bar the plaintiff from all right or claim in, to or upon the premises.

In order to ascertain the rights of the parties and to properly comprehend the legal effect of the various documents offered in evidence at the trial, it is necessary to consider the respective rights and obligations of the predecessors in title to the parties hereto prior to the grant by the city to Henry McCaddin, Jr., in 1866. By reference to that deed it appears that prior

App. Div.]

First Department, June, 1917.

thereto McCaddin was the owner of the upland abutting upon the Harlem river adjoining the premises which were then a part of the tideway of that river. The courts of this State have had occasion to consider and declare the rights of the owners of the upland abutting upon the Harlem river, and they have been thus summarized: "The owner of uplands abutting upon a navigable river where the tide flows and ebbs, takes title only to high-water mark. While he does not own the tideway, or the lands under water beyond the same, he has the easement of passage and the transportation of merchandise, to and fro, between the navigable water and his land; to fish and draw nets; to land boats and to load and unload the same. These privileges are absolute property rights as against all but the State. The State holds the title in fee in the tideway and to the lands under water beyond the same, as trustees for the public in its organized capacity. As such trustee and in the exercise of its governmental functions, it may improve the tideway or the adjacent waters for the benefit of navigation, even to the detriment of abutting upland owners and without compensation to them." (*Matter of City of New York*, 168 N. Y. 134, 143; *Sage v. Mayor*, 154 id. 61, 70.)

The right of the riparian proprietor on a navigable stream to make a landing wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, has been stated by the Court of Appeals to have been comprehended in the language above cited. (*Town of Brookhaven v. Smith*, 188 N. Y. 74, 85; *Barnes v. Midland R. R. Terminal Co.*, 193 id. 378, 383.)

Therefore, prior to 1852, McCaddin and his predecessors in title to the upland had an easement in the lands under water, of passage to and fro, to land boats and merchandise, and for that purpose to construct a dock or pier thereon. The State held the title in fee to the land under water subject to this easement, but vested with the power, in its governmental capacity, to improve the waters for the purpose of navigation, to the detriment of the rights of the upland owner, for the reason that there are certain rights of navigation and commerce by water which are common to all.

By chapter 285 of the Laws of 1852 the mayor, aldermen and commonalty of the city of New York were given the right to lay out and fix a permanent exterior street along the shore of the Harlem river between the East and Hudson rivers, and to cause a map to be made and filed. It was also provided that the several streets and avenues of said city as laid out on the map or plan made pursuant to the act of 1807 (Chap. 115) or as subsequently established by law shall be continued and extended along their present lines, from their present terminations to the said exterior street. By said act there was granted to the city all the right and title of the People of the State to the lands covered with water along the shore of the said Harlem river, from the East to the Hudson rivers and extending from low-water mark to and including the said exterior street or permanent line. There was also given to the proprietors of all grants of land under water or the owners of the upland, a pre-emptive right in all grants which may be made by the city, if any, of the said lands thereby granted.

The city thus became vested with the fee of the lands under consideration, and as grantee of the State held the same in trust for the public in its organized capacity for the promotion of commerce and the general welfare, but also subject to the easement of the riparian owners. Permission that was given to lay out Exterior street did not give to the city the right to take without compensation the easement of the riparian proprietors, as this would be beyond the constitutional power of the Legislature. (*Matter of City of New York, supra*, 145.)

The Legislature (Laws of 1855, chap. 121) authorized the appointment of a board of commissioners for the purpose, among other things, of establishing exterior water lines along the fronts of New York city, beyond which no permanent erections or obstructions were to be made. This commission reported to the Legislature and by chapter 763 of the Laws of 1857 the bulkhead and pier lines were established in accordance with a map filed by the commission with its report.

In the years 1858 and 1859 resolutions were passed by the boards of aldermen and councilmen of the city confirming the survey and map of Exterior street, which is usually designated as the "Southard map." It is interesting to note

App. Div.]

First Department, June, 1917.

that the expressed purpose of laying out this street was that the building of the bulkhead and the contiguous street would be of advantage to shipping and commerce.

On January 16, 1866, the mayor, aldermen and commonalty of the city of New York, in consideration of \$504.59, granted to Henry McCaddin, Jr., and his heirs and assigns forever: "All that certain land under water on Harlem river in front of the upland owned by the said party of the second part between 106th street and the center line of 107th street in the 12th ward of the city of New York." (Then follows a description by metes and bounds and a map thereof is annexed to the deed and reference made thereto.) "Saving and reserving out of the hereby granted premises so much thereof as may form part of any street or streets, avenue or avenues, that may now or hereafter be designated or laid out through said premises according to law, for the uses and purposes of public streets, avenues and highways, as hereinafter mentioned."

The habendum is in fee. The party of the second part covenants that he, his heirs and assigns, "shall and will, within three months next after they shall be thereunto required by the said parties of the first part or their successors, at his or their own proper costs and charges, build and erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be passed or adopted, good and sufficient bulkheads, wharves, streets or avenues which shall form so much and such parts of any street or streets, avenue or avenues, that may now or hereafter be designated or laid out through said premises, according to law, as fall within the limits of the premises first above described, and are reserved as aforesaid from out therefrom, and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof."

The deed further provides that the party of the second part, his heirs and assigns, will at all times forever, at his own cost and expense, maintain and keep in good order and repair all those parts of streets or avenues that may now or hereafter be designated or laid out through said premises according to law which he has covenanted to build and to

obey, fulfill and observe such ordinances, resolutions or orders and directions as the said parties of the first part and their successors shall from time to time pass or make, relative thereto. He further covenants that the said streets and avenues shall forever thereafter continue to be and remain public streets, avenues and highways for the free and common use and passage of the inhabitants of said city, in like manner as the other public streets, avenues, bulkheads and wharves of the said city now or lawfully ought to be. The deed then provides the effect of a default of the party of the second part, his heirs or assigns to perform the above covenants. The party of the second part agrees to pay all taxes, assessments and impositions, ordinary and extra, as are now or thereafter may be imposed or levied upon the property. It was further covenanted that the party of the second part would not build said wharves, bulkheads, streets or avenues or make the lands until permission for that purpose should be first obtained, and would not build or erect any wharf, pier or other obstruction in the Harlem river, in front of the hereby granted premises without the permission of the city.

The parties of the first part covenant that the party of the second part, his heirs and assigns, observing and fulfilling the covenants and agreements of the deed shall "from time to time and at all times hereafter fully have and enjoy, take and receive and hold to their own proper use all manner of wharfage, crantage, advantages or emoluments growing or accruing by or from that part of the exterior line of the said city, lying on the easterly side of the hereby granted premises fronting on the Harlem river, with full power to collect and receive the same for their own proper use and benefit forever." It is further agreed between the parties that the true intent and meaning of the parties to the deed is that nothing therein contained shall be construed or taken to be covenants of warranty or of seizin of the parties of the first part "or to operate further than to pass the estate, right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the State of New York." There is a further provision that if at any time it shall appear that the party of the second part was not seized in fee of the upland

App. Div.]

First Department, June, 1917.

at the date of the deed, the grant shall be void. It is further: "Expressly declared that in using the names of 107th Street, 106th Street, First Avenue and Avenue A in the foregoing description and on the map hereto annexed, it is not intended to dedicate to the public the said streets and avenues, or any part thereof, or of the land which may be used for the same, but that the use of such words was made solely for facility of description of said premises, and for no other purpose, and that the said party of the second part reserves to himself the said streets and avenues and the land comprising the same to the same extent as though the words 107th Street, 106th Street, First Avenue and Avenue A, had not been used herein or on the map hereto annexed."

It is the claim of the city that the land shown on said map as comprised within the lines of Exterior street and Avenue A was expressly reserved from said grant, and that plaintiff had no right, title or interest therein. It is not contended that the grantee and his assigns have not performed all the covenants on his or their part to be performed, and it is conceded that the city has never required the grantee to regulate and pave any streets or avenues on said premises, nor has the city since the grant laid out any street or avenues through said lands, nor has Avenue A or Exterior street been opened.

The map annexed to the deed shows that all the land granted except a triangular piece at the corner of One Hundred and Seventh street having a frontage of about sixty feet on Avenue A and an equal frontage on One Hundred and Seventh street lay within the lines of Avenue A and Exterior street as shown on the map annexed to the deed. As to this triangle the deed granted the fee to McCaddin.

As to that portion lying within the lines of Exterior street and Avenue A it has been held that the fee remained in the city in a case in which the deed, made five years later and conveying land under water on the Harlem river six blocks north of the premises under consideration, which contained a similar reservation. (*Consolidated Ice Co. v. Mayor, etc., supra*. See, also, *Sage v. Mayor*, 154 N. Y. 61; *Mayor, etc., v. Law*, 125 id. 380.) If we were not concluded by these decisions, it would be my individual opinion that a qualified fee passed to McCaddin;

that the estate vested determinable upon a condition subsequent, viz., that if the city gave three months' notice to the grantee, his heirs or assigns to regulate and pave any streets or avenues, as may then have been or might thereafter be designated or laid out through said premises according to law, for the uses and purposes of public streets, that he would at his own expense regulate, grade and pave the same. The covenant by the grantee would then become effective, that the said streets and avenues should forever thereafter continue to be and remain public streets and avenues and highways for the free and common use and passage of the inhabitants of the city. Any easements that the grantee had in or over the premises would merge in the fee, and by virtue of this covenant the city would become forever possessed of the land for street purposes free of any easement therein. If, however, the grantee, his heirs or assigns failed to perform the condition the entire estate granted would revert to the city. Until the city gave the notice, the grantee, his heirs and assigns would have the full beneficial enjoyment of the premises and entitled to the rents, issues and profits thereof. This construction, in my opinion, gives effect to the various covenants and agreements in the deed and makes each part thereof harmonious with the others. There is one provision in the deed under consideration that is not found in the deed in the case of *Consolidated Ice Co. v. Mayor, etc. (supra)* and that is that by the use of the words One Hundred and Sixth, One Hundred and Seventh streets, First avenue and Avenue A, it was not intended to dedicate the same to the public but that the use thereof was for facility of description merely and for no other purpose and "the said party of the second part reserves to himself the said streets and avenues and the land comprising the same to the same extent as though" the said words "had not been used herein or on the map hereto annexed." While this language is an indication to my mind of the intent of the parties as to the effect of the deed, it is not in itself sufficient to distinguish this case in principle from the *Consolidated Ice Co.* case, inasmuch as the remainder of the deeds are in almost identical phraseology.

Even if the city reserved the land within the limits of the street and, therefore, is seized in fee, it does not follow that it

App. Div.]

First Department, June, 1917.

was entitled to the judgment of ejectment granted in this case. The plaintiff is in possession of the premises by virtue of mesne conveyances from Henry McCaddin, Jr., and the express consent of the city, as will more fully appear later in this opinion. As riparian owner of the upland adjoining the premises the plaintiff has the easements of such owner in the land under water to the limit of the bulkhead line established by the harbor commissioners and had the right to construct such docks and bulkheads as were necessary for the enjoyment of his easements (*Town of Brookhaven v. Smith*, 188 N. Y. 74, 85; *Barnes v. Midland R. R. Terminal Co.*, 193 id. 378, 383) subject to the right of the State or its successor, the city, which held the fee in trust for the purposes of promoting navigation and commerce, to make necessary changes thereto in execution of its trust. In executing its trust the riparian rights of the owner of the upland could be destroyed or impaired, if public necessity demanded it for the promotion of commerce and navigation (*Sage v. Mayor*, 154 N. Y. 61), but the city could not destroy or impair the easements of the riparian owner for other purposes without compensation. (*Matter of City of New York*, 168 N. Y. 134.) This right of the plaintiff and its predecessors in title to improve the land between high and low-water mark and beyond, for the purpose of enjoying the riparian easements, is recognized in the McCaddin deed, which contains an express provision that the grantee would not build or erect any wharf or pier or other obstruction in the Harlem river in front of the premises thereby granted without permission of the city. It is also recognized in the provision of the deed that if it should appear that the grantee was not the owner in fee of the upland the grant should be void. The pre-emptive right in the owner of the upland to any grant of the lands under water made by the city, secured by the act of 1852, was to safeguard the riparian easements of such owner.

The city can only curtail or restrain the exercise of this right by the plaintiff, as owner of the upland, when the public welfare makes it necessary to do so, or the plaintiff has failed to perform the covenants of his grant. It cannot eject the plaintiff, merely because it is the owner of the fee, for its

ownership of the fee is in trust, merely, and can only be exercised in the interest of the public and in execution of the trust, and for the further reason that the plaintiff is in possession, with the express permission of the city granted upon a valuable consideration, in the enjoyment of easements of which it cannot be deprived summarily and without adequate compensation. The city can, therefore, gain possession of these premises free from the easements of the plaintiff only through the power of eminent domain, so long as the covenants and agreements of the grantee, his heirs and assigns, in the McCaddin deed are faithfully performed. The judgment that the city of New York is seized of an estate in fee simple absolute in the premises and all estate and rights therein and be let into possession thereof and that the plaintiff, Burns Bros., has no right or interest in or to the premises must, therefore, be reversed and the counterclaim dismissed.

The question remains, is the plaintiff entitled to a judgment against the city. In considering this further facts must be stated. By the act of 1857 (*supra*) a continuous bulkhead along the water front in this part of the Harlem river was contemplated. In 1868 it was enacted (Laws of 1868, chap. 150) that "It shall be lawful for the proprietors of the grants of land under water in the Harlem river, between termination of the Second avenue and the East river, instead of building an exterior continuous bulkhead, as now laid out by the harbor commissioners, to erect piers and wharves therein, and to excavate the slips between the same, but in no case shall any such pier or wharf be extended into the river further than the said exterior line, as fixed by the said harbor commissioners." This act was amended in 1872 (Laws of 1872, chap. 487) by substituting Third avenue for Second avenue. (See, also, Consol. Act [Laws of 1882, chap. 410], § 733.)

The Legislature thus authorized an abandonment of Exterior street for the uses designated in the act of 1857 and the purposes declared in the resolutions of the commonalty of the city in laying out the street, and gave permission to the proprietors of water grants to erect piers and wharves within the limits of said street and excavate the land between such piers and wharves. On the 17th day of April, 1883, Henry McCaddin, Jr., conveyed the upland and the property conveyed by

App. Div.]

First Department, June, 1917.

the last-mentioned deed to Robinson Gill, which conveyance was subject to all the conditions, reservations, covenants and agreements contained in the deed of the mayor, etc. to McCaddin. On the 24th day of December, 1883, Robinson Gill made application to the board of dock commissioners of New York city as follows:

" NEW YORK, 24 Decr., 1883.

To The Board of Docks Commissioner,

" New York City:

" The subscriber being the owner of upland indicated by blue color on the plan hereto annexed, reference being had to said plan for location &c. and also of the adjoining land between the high-water line and Harbor Commissioners exterior line as indicated by pink color on said plan and being desirous to so improve the same, as to make it available for use in his business of stone working and also to provide wharfage with steam hoisting facilities &c., for himself and such others as may require the use of them, would respectfully request your permission to enclose with a suitable wall such part of said land as lies west of the easterly line of Avenue A. and fill in the same to the grade of Avenue A. and also to build easterly from said wall to the Harbor Commissioners exterior line, a suitable pile wharf of such construction as your Board may direct.

" Yours respectfully,

" (Signed) ROBINSON GILL.

" Per C. L. P."

On February 29, 1884, the secretary of the board of dock commissioners wrote to Robinson Gill as follows:

" *Feby. 29th, 1884.*

" ROBINSON GILL, Esq.:

" SIR.—At a meeting of the Board governing this Department held on the 28th inst., the following resolution was adopted:

" *Resolved*, that permission be and hereby is given to Robinson Gill, alleged owner of land under water between 106th and 107th Streets, East and Harlem Rivers, and of the upland adjacent thereto, to construct and maintain; provided the same is commenced and completed within the

next twenty months, a retaining structure of solid pile work with a platform about twenty feet wide, supported on piles in front thereof, on the west side of Harlem River, from the north side of 106th Street to the south side of 107th Street, the outer or river face of said platform to be located on the Bulkhead line as at present established for said river, and to fill in behind the said retaining structure with good stone and clean earth and other suitable material up to the established grade of the said Bulkhead, the entire structure to be built under the supervision and direction of the Engineer-in-Chief of this Department, and in accordance with specifications therefor to be submitted to this Board for its approval of same; also provided the said owner file in this Department within ten days after adoption hereof, an agreement in writing that he will change or remove the said structure whenever the Bulkhead line for Harlem River shall be changed by the proper authorities so as to require the same to be done, and that if required by the terms and conditions as provided in the grant of the said lands by the City, he further agrees that he will pay one-half the cost of building a suitable Bulkhead at the foot of 107th Street, Harlem River.

"Yours respectfully,

"JOHN I. CUMING,

"*Secretary.*"

And Robinson Gill, on the 8th day of March, 1884, wrote the commissioners of the department of docks acknowledging the receipt of a copy of the resolutions and accepting the permission subject to the conditions therein contained. Thereupon Robinson Gill proceeded to fill in the land under water and built a wharf on the premises.

The plaintiff predicates its claim to a title by adverse possession upon the statement in Gill's application to the board of dock commissioners that he is the owner of the upland and also of the adjoining land between high-water line and harbor commissioners' exterior line. This was not, however, an assertion of a hostile claim to title in the premises. Gill was in possession of the premises through a known title derived from the city by the grant to McCaddin. A title by adverse possession only arises from long-continued use

App. Div.]

First Department, June, 1917.

or possession when a man can show no other title or right of possession, the law implying a grant from the fact of the continued use or possession without objection. If other title or right of possession can be shown, no right in the premises adverse to that right or title will be implied from possession; the possession or use will be held to be under the known title.

The application to the board of dock commissioners was made in exact compliance with the covenant in the deed to McCaddin that the grantee, his heirs and assigns, would not build wharves or bulkheads on the property until permission for that purpose shall be first had from the city.

The department to which this application was made was vested with the exclusive power to grant such permission on behalf of the city. (Consol. Act [Laws of 1882, chap. 410], §§ 711-728.) The use of the property for which permission was desired was entirely consistent with the grant and was not contrary to any of the rights or title reserved by the city in the grant, but was a use which the grantee and his assigns was allowed to make of the property until the city gave notice of the requirement that streets, avenues, bulkheads or wharves should be regulated, paved or erected.

There has been no possession of the plaintiff adverse to the city.

The mere statement of an unfounded claim by one then in lawful possession cannot change the character of his possession nor impose any obligation on the other party to alter his position in relation thereto.

This view of the case makes it unnecessary for us to discuss the other questions presented by counsel, viz., whether a party could gain title to premises reserved for street purposes, by taking possession thereof; whether the provision repealing the portion of the act of 1852 that related to the exterior street contained in chapter 697 of the Laws of 1887 was constitutional; and the effect of the assessment of taxes and the payment thereof by the plaintiff and its predecessor in title. These questions have all been determined adversely to the appellant's contention. (*Mayor, etc., v. Law*, 125 N. Y. 380, 394; 6 N. Y. Supp. 628, 633; *Consolidated Ice Co. v. Mayor, etc.*, 166 N. Y. 92, 101.) The plaintiff has shown no right of action as against the city.

Each of the parties hereto has rights in the property, and so far as appears in this action can continue to hold and enjoy the same, and neither one is in position to eject the other therefrom.

The judgment will, therefore, be reversed, with costs to the appellant, and the complaint and the counterclaim dismissed, without costs to either party as against the other.

CLARKE, P. J., LAUGHLIN, DOWLING and SMITH, JJ., concurred.

Judgment reversed, with costs to appellant, and complaint and counterclaim dismissed, without costs to either party as against the other. Order to be settled on notice.

ALBERT FREEMAN, Plaintiff, v. JAMES B. HANNA and CORNELIUS S. SWEETLAND, as Trustees under a Declaration of Trust Made with ALBERT FREEMAN, Dated October 25, 1911, and HAWTHORNE SILVER AND IRON MINES, LIMITED (INC.), Defendants.

First Department, June 8, 1917.

Trust — deed transferring stock to trustees for benefit of corporation — trust period not measured by lives — unlawful suspension of power of alienation — grantor entitled to decree declaring deed void and requiring trustees to account for dividends, etc.

A deed whereby the owner of stock of a mining corporation conveyed the same in trust to be held by the trustees for the benefit of the stockholders of the corporation, to be disposed of from time to time by a vote of the directors, the dividends thereof to be paid into the treasury of the corporation, unless the same should become insolvent or bankrupt, with power in the trustees to vote upon said stock in their absolute discretion, the dividends, however, in case of the insolvency of the corporation, to be applied as the trustees in their discretion might deem to be for the best interests of the stockholders, with a right in the trustees to sell the stock in their discretion and to apply the proceeds as aforesaid, creates a trust which imposes active duties upon the trustees, and they were not a mere channel of conveyance to vest an absolute property in the beneficiary. Hence, where the duration of said trust is not measured by lives there is an unlawful suspension of the power of alienation beyond the period allowed

App. Div.]

First Department, June, 1917.

by the statute, and the grantor is entitled to a decree declaring the deed null and void and requiring the trustees to deliver the stock to him together with dividends which have been received by them.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Wilson B. Brice, for the plaintiff.

George B. Francis, for the defendant trustees.

Ernest W. Marlow, for the defendant Hawthorne Silver and Iron Mines, Limited (Inc.).

PAGE, J.:

The action is brought by the plaintiff, Albert Freeman, the grantor of a certain trust, against the defendants, James B. Hanna and Cornelius S. Sweetland, the trustees, and Hawthorne Silver and Iron Mines, Limited (Inc.), the beneficiary of the said trust, to obtain from this court a construction thereof and directions as to the disposition of the moneys conveyed in trust. The defendant Hawthorne Silver and Iron Mines, Limited (Inc.), is a corporation of the State of Delaware, of which the plaintiff, Albert Freeman, was a director and stockholder on and prior to October 25, 1911. The said Albert Freeman was also the owner of upwards of 30,000 shares of the capital stock of the McIntyre Porcupine Mines, Limited, of the par value of five dollars each. Shortly prior to October 25, 1911, Albert Freeman learned that the United States grand jury for the Southern District of New York was investigating the activities of himself and his associates with respect to the sale of the stock of the Hawthorne Silver and Iron Mines, Limited (Inc.), charges having been made that they had violated the United States statutes concerning the use of the mails to promote fraud. Pending these investigations Albert Freeman granted the said 30,000 shares of the capital stock of McIntyre Porcupine Mines, Limited, to the defendants James B. Hanna and Cornelius S. Sweetland, as trustees, and a written declaration of trust signed by the said trustees and approved by Albert Freeman was made in the following language:

"Said shares of stock are held by us as trustees for the benefit of the stockholders of said Hawthorne Co. and sub-

ject to such specific directions as to the disposition of the same as may be given from time to time by vote of the board of directors of said company, of which we are duly notified in writing, subject, however, to the limitations and conditions hereinafter set forth; all dividends received by us as trustees upon said shares, shall be paid over by us, immediately upon receipt of the same, and without deduction of any fees, to the treasury of said Hawthorne Company unless said company is then in the hands of a receiver or proceedings in bankruptcy or insolvency have been instituted and are pending against it. Said shares of stock of said McIntyre Company are to be transferred into our names as trustees hereunder, and we are to have full power to vote upon the same in our absolute discretion at any meeting of the stockholders of said company. The above named shares of said McIntyre Company shall not be subject to attachment in any way, or to be reached in any law suit or proceeding at law or in equity which may be brought in any jurisdiction against said Hawthorne Company, and in case of the insolvency or bankruptcy of said company at any time, or in case a receiver is appointed for said company, said company shall thereupon forfeit any and all interest, either in law or in equity, which it may have in said shares under this declaration of trust, and the trustees shall thereafter apply any dividend upon the same in such manner as they in their absolute discretion and without accountability to any one, may deem to be for the interests, directly or indirectly, of the stockholders of said Hawthorne Company, and the trustees hereunder shall thereafter continue to hold said shares of stock with the right to sell and dispose of the same at any time in their discretion at public or private sale, in such manner as they may deem best, and to apply the proceeds of such sale or sales in the same manner as above specified in the case of dividends upon said shares."

Prior to the 25th day of February, 1917, the McIntyre Porcupine Mines, Limited, declared a dividend of five per cent upon its capital stock, and the amount of dividend on the aforesaid stock which the trustees have received and are now holding is \$7,500.

Albert Freeman, the plaintiff, prior to the commencement of this action has elected to treat the said transfer of stock

App. Div.]

First Department, June, 1917.

of the McIntyre Porcupine Mines, Limited, to the said trustees as void, and has notified the said trustees of such election and demanded a return of said stock and all dividends received thereunder. The Hawthorne Silver and Iron Mines, Limited (Inc.), is not insolvent nor in the hands of a receiver, nor have proceedings in bankruptcy or insolvency been instituted against it. The plaintiff demands that the transfer be declared void. The defendant trustees merely ask that the rights of the several parties to the stock and dividends be determined, and that they be instructed as to their duties as trustees, and the defendant Hawthorne Silver and Iron Mines, Limited (Inc.), demands that the declaration of trust be construed as an absolute conveyance or deed of gift of the said stock to the Hawthorne Silver and Iron Mines, Limited (Inc.), or in the alternative, that the trust be declared valid and the Hawthorne Silver and Iron Mines, Limited (Inc.), be declared to be the beneficiary thereof.

The plaintiff's claim is that the trust imposed active duties upon the trustees and the period of its duration was not measured by lives, for which reason it claims that the trust is void because it suspends the power of alienation beyond the period provided for in the statute. (See Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 11.) The defendant Hawthorne Silver and Iron Mines, Limited (Inc.), claims that no active duties were imposed upon the trustees, and that, therefore, the trust was merely a channel of conveyance vesting an absolute property in the beneficiary. The question which will decide both of these claims is whether the trustees have active duties to perform under their declaration of trust. In our opinion they have. The declaration of trust contemplates that all dividends shall be received by the trustees and paid over to the Hawthorne Company, and that the trustees shall hold the legal title to the stock and vote upon the same in their discretion at any meeting of the stockholders of the company. Furthermore, the trustees were to hold the property, and in the event of the insolvency or bankruptcy of the company at any time, or in case a receiver is appointed, are to have a further discretion to use the property in any way which may seem fit to them, either directly or indirectly for the interests of the stockholders of the Hawthorne Com-

pany. The defendant, recognizing that these duties rendered the trust an active one, attempted to avoid the effect of the statute by construing the following words: "and the Trustees hereunder shall thereafter continue to hold said shares of stock with the right to sell and dispose of the same at any time in their discretion," to mean that the trustees at all times had the right and power to sell and dispose of the same, for, they say, how could the trustees continue to hold the said shares of stock with a right to sell and dispose of the same, unless they had had that right from the beginning. The difficulty with this proposition, however, is that the word "continue" logically relates only to the holding of the shares by the trustees and not to the right to sell which came into being only after the insolvency of the company.

I am of the opinion that the trust is an active one, and not being measured by lives contravenes the statute against the suspension of the power of alienation for more than two lives in being. It is accordingly void, and the plaintiff is entitled to judgment directing the trustees to deliver to him the property and account for all dividends received. Judgment should be granted accordingly, with costs to plaintiff.

CLARKE, P. J., DOWLING, SMITH and SHEARN, JJ., concurred.

Judgment ordered for plaintiff, with costs. Order to be settled on notice.

SAKS & COMPANY, Respondent, v. THE NEW YORK EDISON COMPANY, Appellant.

First Department, June 8, 1917.

Contract — agreement to reduce rates for electric current if reductions are made to other consumers — reductions made to consumer in lieu of payment of rent — contract construed — when plaintiff not entitled to recover alleged overpayment — limitation of action.

Action to recover overpayments alleged to have been made by the plaintiff for electric current furnished by the defendant during a period of nine years. The contract provided that in the event of any reduction in the prices of the defendant made to another consumer using current under like conditions as the plaintiff, corresponding reductions should be made

App. Div.]

First Department, June, 1917.

in the terms of the contract with the plaintiff. On the trial it was shown that the defendant, occupying a portion of premises owned by another consumer for use as a substation for the manufacture of its electricity, made a contract with such consumer to furnish current at rates lower than those charged the plaintiff for current consumed up to the value of \$10,000, and that for current consumed in excess of said sum the sum of \$3,500 was charged against the rent for the use of the aforesaid station, and thereafter any current used in excess of \$13,500 was to be paid for by said customer at the regular wholesale rate charged to the plaintiff and others.

Held, that the reduction in rates to the other customer was in fact made in payment of the rental value of the premises occupied by it for a substation, and hence the plaintiff had failed to establish a cause of action upon its contract.

By the contract with the other consumer it was intended to effect a payment of rent, although a clause in the contract stated that the defendant was to use the consumer's premises "free and without charge," for said phrase was loosely used and not intended to contradict the prior provisions of the contract.

The plaintiff's action, although based upon a fraudulent concealment and misrepresentation by the defendant, being merely an action to recover a money judgment for overpayments, the Statute of Limitations began to run when the payments were made and the right to recover them accrued, and not from the date of the discovery of the fraud. Hence upon a new trial no payments can be recovered which were made more than six years prior to the commencement of the action.

MOTION by the defendant, The New York Edison Company, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance after the rendition of a verdict in plaintiff's favor by direction of the court upon a trial at the New York Trial Term in April, 1916.

Henry J. Hemmens and *Thomas H. Beardsley*, for the motion.

Alfred P. W. Seaman, opposed.

PAGE, J.:

The action is brought by the plaintiff, Saks & Company, to recover from the New York Edison Company overpayments alleged to have been made for electric current consumed by the plaintiff during the period from January 1, 1904, to January 1, 1913.

The complaint alleges that pursuant to a contract made

between the plaintiff and the defendant on the 5th day of December, 1903, it was agreed that defendant should furnish electric current to the plaintiff at certain specified rates, with a proviso that in the event of the defendant making any reduction in prices to a customer using current under like conditions, corresponding reductions in prices should be made to the plaintiff.

It is further alleged that on the 10th day of March, 1904, the defendant made a contract with the Broadway Realty Company, whereby it reduced the cost of electric current to the said Broadway Realty Company at all times since the 5th day of December, 1903, to a price of three cents per kilowatt hour, and that by the terms of the contract between the plaintiff and the defendant the plaintiff became entitled to that rate. It is then alleged that the defendant concealed from the plaintiff the fact that it had made this reduction to the Broadway Realty Company, and the plaintiff had no knowledge or notice thereof until the month of December, 1912, and that the defendant falsely and fraudulently represented to the plaintiff in writing each and every month from the 1st day of January, 1904, to the 1st day of January, 1913, that there was due from the plaintiff to the defendant for current used, certain amounts charged at full prices, provided in the original contract between them, without any reduction, and that relying upon the said statements by the defendant the plaintiff paid the amount of the bills so rendered.

It is further alleged that the plaintiff thereafter demanded repayment of the said overpayments, with interest, and the defendant has refused to make the same. Judgment is demanded that the plaintiff recover from the defendant the amount of such overpayments, with interest and costs.

Upon the trial the contract between the plaintiff and the defendant for current was placed in evidence. The portion thereof material to the questions raised upon this motion provides: "In the event of any reduction in the prices of The New York Edison Company made to a customer using current under like conditions, corresponding reductions shall be made in the terms of this contract as herein scheduled."

The first question raised in the action involves a construction of this clause for the purpose of determining what is

meant by the words: "to a customer using current under like conditions." It was shown that the Broadway Realty Company, with whom the defendant is alleged to have made a contract at a rate lower than that given to the plaintiff, used the current merely for lighting purposes and in quantities approximating the quantity consumed by the plaintiff. The plaintiff conducts a large dry goods establishment, and the Broadway Realty Company operates an office building known as the Bowling Green Building. The only material difference between the service rendered the Broadway Realty Company and that rendered to the plaintiff consists of the fact that the New York Edison Company had a substation in the basement of the Bowling Green Building which it used for the purpose of supplying all the other buildings in that vicinity, and the Broadway Realty Company was able to obtain its current direct from the substation without the intervention of channels of conveyance through the streets, whereas the plaintiff obtained its current by conveyance from a substation at a greater distance.

The learned trial justice, over the exception of the defendant, received evidence showing that at the time when the contract was made conversations were had between the agents acting on behalf of the plaintiff and the defendant, explaining the meaning of this clause and tending to show that the plaintiff was to receive the same rate as any consumer in the city of New York buying a similar quantity of current for like purposes. This evidence was received on the theory that the words of the contract are ambiguous. While I do not agree with the learned trial justice that the contract was ambiguous, I think his finding upon the evidence that the plaintiff and the Broadway Realty Company were customers "using current under like conditions" within the meaning of the contract, was correct and could be supported by a reasonable interpretation of the language of the instrument alone, without outside evidence. The defendant practically concedes this and does not urge the point before this court.

A more serious question is presented, however, as to the interpretation of the contract between the defendant and the Broadway Realty Company. That contract provides in paragraph "2.:"

"In consideration of the use of the basement of said premises for the storage batteries and other apparatus of said Edison Company, all of which is now installed therein, the price for such current supplied under said contract shall be three cents (3c) a kilowatt hour."

Paragraph "3" provides:

"On and after May 1st, 1904, and during the remainder of the term of said contract, should such payments exceed the sum of \$10,000 annually, any excess thereof, to an amount not exceeding \$3,500 is to be credited to the annual rental of said basement, and said current is to be supplied in payment for such annual rental; for all current supplied in excess of 450,000 kilowatt hours annually, the price is to be three cents (3c) a kilowatt hour."

Paragraph "5" provides:

"Said Realty Company hereby leases to said Edison Company the space in said basement hereinbefore referred to, for and during the continuance of this contract, for the purposes above specified, free and without charge for such use and occupancy, except as stipulated in the foregoing paragraph numbered 3."

It was shown by the bills rendered by the New York Edison Company to the Broadway Realty Company for electric current that the parties to that contract interpreted it as allowing the Broadway Realty Company a rate of three cents per kilowatt hour for current consumed up to \$10,000 per year, and in years when the consumption of the Broadway Realty Company exceeded \$10,000, any excess thereof to the amount of \$3,500 was charged against rent for the use of the aforesaid substation, and thereafter any current used in excess of \$13,500 was paid for at the regular wholesale rate charged to the plaintiff and all other customers.

The plaintiff's whole contention and basis for this action is, that the rate of three cents a kilowatt hour for current used up to the amount of \$10,000 was one-half cent per kilowatt hour less than the amount which it was charged under its contract with the defendant, and, therefore, it was entitled to the rate of three cents upon all current consumed by it up to that amount. The defendant's answer to this proposition is that the difference between the regular wholesale rate charged

App. Div.]

First Department, June, 1917.

to the plaintiff, and the three-cent rate allowed to the Broadway Realty Company, represented rent for the use of the basement of the Bowling Green Building for a substation. The plaintiff points, however, to paragraph "5" of the contract quoted above which says that the realty company "hereby leases to said Edison Company the space in said basement hereinbefore referred to, * * * free and without charge for such use and occupancy, except as stipulated in the foregoing paragraph numbered 3." The plaintiff and the learned trial justice have construed this clause of the contract to mean that except for the provision allowing \$3,500 to be credited to annual rental whenever the consumption of current by the Broadway Realty Company should exceed \$10,000, there was to be no charge for rent of the basement, and, therefore, the rate of three cents allowed upon all current up to \$10,000 was without consideration and formed no portion of the rent. We think this construction does violence to the language of the contract. As shown above, clause "2" of the contract fixing the rate at three cents per kilowatt hour expressly states that it is so fixed "in consideration of the use of the basement of said premises for the storage batteries and other apparatus of said Edison Company." The mere fact that in clause "5" the contract stated that the Edison Company was to use the space "free and without charge" is not sufficient to offset the actual nature of the agreement as shown by the prior clause. The right to the use of the basement of a large office building is a substantial and valuable right which the Broadway Realty Company would probably not intend to give free of charge during any year in which it might consume less than \$10,000 worth of current. In fact during several years of the term of the contract the said company did consume less than \$10,000 worth of current which, under the construction contended for by the plaintiff, would have allowed the defendant the use of the basement without charge. It is stipulated in the record that the agreement was drawn by laymen without the assistance of counsel, and a reading of the entire agreement, together with the interpretation placed upon it by the parties in the bills rendered, show that the words "free and without charge" in paragraph "5" thereof were loosely used and were not intended as a

contradiction of the provisions of paragraph "2" stating that the rate of three cents was made in consideration of the use of the basement. It seems to me, therefore, that the proper interpretation of the contract is that the rental to be paid by the New York Edison Company for the basement was the difference between the three-cent rate to be allowed the Broadway Realty Company upon all current used, and the regular wholesale rate, and in years when the Broadway Realty Company should use more than \$10,000 worth of current, the New York Edison Company should pay an excess rent by giving free current to the additional amount of \$3,500.

The plaintiff's contention is that these provisions of the agreement were merely a subterfuge for the purpose of hiding an unjust discrimination. It has not been shown, however, that the total amount of reduction allowed to the Broadway Realty Company for the use of current is less than the reasonable rental value of the basement; in fact, no evidence as to the reasonable value of the use and occupation of the basement was offered. If the rental value of the basement was equal to or in excess of the amount allowed to the Broadway Realty Company by the defendant under this contract, then it is clear that the Broadway Realty Company has not been allowed a cheaper rate for the use of current than that given to the plaintiff.

I think, therefore, that the plaintiff has failed to show that the defendant granted a reduced rate to the Broadway Realty Company and has failed to establish a cause of action.

Another point raised by the defendant which it is unnecessary to consider in my view of the case, but which might become material upon a new trial, is the question of the bar of the Statute of Limitations as to a portion of the plaintiff's claim. Though the action is not an action in contract, as claimed by the defendant, but is based upon fraudulent concealment and misrepresentation by the defendant, nevertheless, it is merely an action to recover a money judgment, and the Statute of Limitations runs from the time when the payment was made and the right to recover it back accrued, and not from the date of the discovery of the fraud. (Code Civ. Proc. § 382, subd. 5.) The plaintiff has attempted to

App. Div.]

First Department, June, 1917.

show that by reason of a credit of twenty-seven cents allowed on the account by the defendant within six years of the commencement of the action, it was an open and running account, and the Statute of Limitations is no bar. The difficulty with this argument, however, is that the action is not brought to recover upon an open and running account, but is merely an action to recover money paid by mistake, induced by fraud of defendant.

I am of the opinion that there is no answer to the defendant's claim that the Statute of Limitations applies and that the plaintiff, in any event, upon a new trial could not recover installments of money overpaid more than six years prior to the commencement of the action.

The exceptions are sustained and the verdict set aside and a new trial ordered, with costs to defendant to abide the event. The finding of the jury that the overpayments, to recover for which the action is brought, were made in consequence of defendant's false and fraudulent representations upon which the plaintiff relied, is reversed.

CLARKE, P. J., LAUGHLIN, DOWLING and SMITH, JJ., concurred.

Exceptions sustained, verdict set aside, and new trial ordered, with costs to defendant to abide event. Order to be settled on notice.

HENRY F. SCHWARZ, as Trustee for ANNA C. F. SCHWARZ under the Will of FREDERICK A. O. SCHWARZ, Deceased, Appellant, Respondent, v. SELMA ALEXANDER and Others, Defendants, Impleaded with SAMUEL SILK, Respondent, Appellant.

First Department, June 8, 1917.

Mortgage — foreclosure — receivership clause, when binding upon tenant — equity not bound by such clause — when rents collected from subtenants should be paid to tenant by receiver.

A provision in a recorded mortgage on real estate which entitles the mortgagee to an appointment of a receiver of the rents and profits, without notice and without regard to the adequacy of the security in case of

default by the mortgagor, is binding upon a subsequent lessee of the premises, as he took his lease with notice of said provision.

Moreover, the tenant takes his lease subject to having the rents of his subtenants impounded by a receiver in case of a foreclosure.

But such receivership clause does not entitle the mortgagee to the appointment of a receiver as a matter of right.

Nothing can move a court of equity to action except equity and good conscience, and the court will adjust its relief to work substantial justice; hence, where it appears that the lease was made in good faith, and not for the purpose of defeating the rights of the mortgagee, and the lessee has paid the rent to his landlord, the mortgagor, during the period the rent of the subtenants had accrued, the court in its discretion properly directed the rents of the subtenants to be paid to the tenant when collected by the receiver.

CROSS-APPEALS by the plaintiff, Henry F. Schwarz, as trustee, and by the defendant Samuel Silk, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of April, 1917, resettling a prior order and directing a receiver of the rents and profits in a foreclosure action to pay over certain rents to a tenant and refusing to allow the tenant to attorn to the receiver and collect and receive rents from the subtenants.

Stephen Barker, for the plaintiff.

Abraham J. Halprin, for the defendant Silk.

PAGE, J.:

The mortgage to foreclose which this suit was brought contained the following clause:

"*Fourth.* That the holder of this mortgage, in any action to foreclose it, shall be entitled, without notice and without regard to the adequacy of any security for the debt, to the appointment of a receiver of the rents and profits of said premises; and said rents and profits are hereby, in the event of any default or defaults in paying said principal or interest, assigned to the holder of this mortgage as further security for the payment of said indebtedness."

The mortgage was recorded on the 29th day of March, 1906. Thereafter, and on or about the 14th day of September, 1916, the entire premises were leased for a term of three

App. Div.]

First Department, June, 1917.

years to Samuel Silk, who entered into possession of the premises and paid the rent reserved in the lease in monthly installments to and including the month of March, 1917. The premises were rented by Silk to various subtenants. An action to foreclose the mortgage was commenced, and on the 22d day of March, 1917, an order was entered appointing a receiver of the rents, issues and profits of the premises. Silk thereupon, upon a petition and order to show cause, moved the court to restrain the receiver from collecting the rents from any of the persons in the premises, except from Silk pursuant to his lease, and also directing the receiver to pay over to Silk the rents which the receiver had collected. This motion was denied, except that the receiver was directed to pay over to Silk any rents from subtenants, collected by him, which had accrued prior to his appointment. Silk has appealed from so much of the order as denied his motion, and the plaintiff has appealed from that portion of the order which directs the receiver to pay over to Silk.

The lease to Silk was subject to the terms and conditions of the mortgage, and he received his lease with notice thereof. By this mortgage the rents and profits of the premises, in case of default, were specifically assigned to the mortgagee as further security for the debt. This did not mean that there was assigned only the rent reserved in a lease of the entire premises, but that rents and profits of the premises were so pledged and Silk took his lease subject to having the rents of the subtenants impounded by a receiver in case of a foreclosure. (*Fletcher v. McKeon*, 71 App. Div. 278.) The existence of the receivership clause containing the assignment of the rents does not, however, entitle the mortgagee, as of right, to the appointment of a receiver of the rents. The theory of the right of the mortgagee to the rents and profits is that he has an equitable lien thereon, and the appointment of the receiver is regulated by sections 713 and 716 of the Code of Civil Procedure. (*Jarmulowsky v. Rosenbloom*, 125 App. Div. 542.) Nothing can move a court of equity to action except equity and good conscience, and a court of equity will so adjust its relief as to work substantial justice. Where it appears, as it does in the case at bar, that the lease was made in good faith and not for the purpose of

defeating or impairing the rights of the mortgagee (as in the *Fletcher Case*, *supra*) and the lessee had paid the rent to the landlord for the months during which the rent of the subtenants accrued, it was a proper exercise of the discretion of the court to direct the payment to the tenant of the past due rents of the subtenants which the receiver had collected.

The order should be affirmed, without costs.

CLARKE, P. J., DOWLING, SMITH and SHEARN, JJ., concurred.

Order affirmed, without costs.

HENRY CARVILL, Respondent, v. MIRROR FILMS, INC.,
Appellant.

First Department, June 15, 1917.

Master and servant — assignment of claim — action for breach of contract of employment — defense — judgment in prior action by assignee of claim for breach of contract — damages — enforcement in equity of partial assignment — waiver of rule that only one recovery may be had on same cause of action.

Where, in an action for wrongful discharge, it appears that the plaintiff was employed for a term of one year beginning January 1, 1916, at a stated salary per week; that he commenced work on January seventeenth and after about three weeks was discharged; that on February fourteenth he made an assignment of his claim for damages for a breach of the defendant's agreement "covering all damages which have accrued to me or may accrue up to March 6, 1916, reserving to myself all damages which may accrue after said date;" that on February twenty-fourth the assignee brought an action in the Municipal Court against the defendant in which the pleadings were oral and in which a judgment was rendered for the plaintiff, and that the defendant had no knowledge or means of knowing that the assignment was a partial one, said judgment is a defense in the present action and the complaint should be dismissed.

A plaintiff's claim in an action for wrongful discharge is for unliquidated damages resulting from the master's breach of the contract of employment, and so far as regards the period subsequent to the dismissal only a single cause of action accrues, although compensation is payable in installments.

If a servant elects to sue for damages for a breach of the contract prior to the expiration of the term of employment, he may recover for the whole term.

There can be but one recovery for a single breach of a contract.

App. Div.]

First Department, June, 1917.

A party cannot split a single cause of action and bring several actions to recover the damages flowing therefrom. Nor can he split a single cause of action into several parts and by assignment give the right to others to severally sue to recover their part.

While a court of equity recognizes and enforces a partial assignment, it does not allow the recovery of a partial amount in favor of the assignee in one suit and the maintenance of another action by the assignor, but insists that all the parties interested in the cause of action must be before the court that all their rights may be adjusted in one action.

The rule that where one suit has been brought and recovery had for a portion of the claim, a subsequent action thereon is barred, is for the protection of the debtor, and may be waived by him.

SMITH, J., dissented, with opinion.

APPEAL by the defendant, Mirror Films, Inc., from a determination and order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on or about the 14th day of February, 1917, reversing a judgment in the Municipal Court of the City of New York for the third district, borough of Manhattan, in favor of the defendant and granting judgment for the plaintiff.

John J. Curtin, for the appellant.

Paul N. Turner, for the respondent.

PAGE, J.:

The case was submitted to the Municipal Court on an agreed statement of facts which are substantially as follows: That on October 7, 1915, plaintiff was employed for a term of one year beginning January 1, 1916, at a salary of \$100 per week. The plaintiff commenced work on January seven-teenth and worked continuously until February 5, 1916, and was paid for these three weeks. On February 4, 1916, the plaintiff notified the defendant that his services would not be required after February 5, 1916. On February 14, 1916, the plaintiff made an assignment to one Jones of "All that certain claim and demand which I have against the Mirror Films, Inc. for damages for the breach of its agreement of hiring with me, this assignment covering all damages which have accrued to me or may accrue up to March 6, 1916, reserving to myself all damages which may accrue after said date." On the 24th day of February, 1916, Jones brought

an action in the Municipal Court against the defendant herein for the sum of \$600 by the service of a summons indorsed "Breach of contract and assignment." Such proceedings were had in said action that on the 4th day of March, 1916, the plaintiff therein recovered judgment against this defendant for \$600 damages exclusive of costs for the six weeks' salary from the date of his discharge to March 6, 1916. This judgment the defendant paid. The present action was commenced by the service of a summons on the 13th day of June, 1916, and thereafter a verified complaint was filed to which the defendant filed an answer, denying the material allegations of the complaint, and as a defense set up the assignment of the cause of action to Jones and the recovery of the judgment by him. Upon the agreed statement of facts judgment was given for the defendant dismissing the complaint, with costs. This judgment was reversed by the Appellate Term and judgment granted for plaintiff for \$1,000 damages, besides costs (98 Misc. Rep. 650).

It has long been settled that the plaintiff's claim in an action for wrongful discharge is for unliquidated damages resulting from the master's breach of the contract of employment, and that so far as regards the period subsequent to the dismissal only a single cause of action accrues, although compensation is payable in installments. The reason for this rule is that the contract for hire of a person for a specified period for a certain sum payable at fixed intervals during the period is entire and indivisible. Although the compensation be fixed in the contract the damages arising from the breach thereof are unliquidated because they are subject to reduction by circumstances arising subsequent to the discharge, viz., employment or opportunities for employment.

If the servant elects to sue for damages for the breach of the contract prior to the expiration of the term of employment, this court is committed to the rule that he can recover damages for the whole term. (*Davis v. Dodge*, 126 App. Div. 469; *Cottone v. Murray's*, 138 id. 874.)

It has been a settled and well-understood principle of law that there can be but one recovery for a single breach of a contract. (*Secor v. Sturgis*, 16 N. Y. 548; *Perry v. Dickerson*, 85 id. 345; *Dickinson v. Tysen*, 125 App. Div. 735, 737.)

App. Div.]

First Department, June, 1917.

Therefore, if the first action had been between the parties hereto, and the plaintiff had asked for his damages up to March sixth there could be no doubt that his recovery of judgment in that action would bar a second action to recover damages accruing after March sixth up to the end of the term of employment. A party cannot split a single cause of action and bring several actions to recover the damages flowing therefrom. Nor can he split a single cause of action into several parts and by assignment give the right to others to severally sue to recover their part. That which he could not do himself he cannot authorize another to do for him. It cannot be questioned but that a single debt may be partially assigned to one or more assignees, but such an assignment creates equitable rights in the assignees which can be enforced in a court of equity alone, and in an action to which the assignor and assignees as well as the debtor are parties, so that a court of equity can adjust its relief to the satisfaction of the rights of the parties. While a court of equity recognizes and enforces a partial assignment it does not allow the recovery of the partial amount in favor of the assignee, in one suit, and the maintenance of another action by the assignor, but insists that all the parties interested in the cause of action must be before the court that all their rights may be adjusted in one action, thus recognizing and enforcing the rule that the cause of action cannot be split and the debtor forced to submit to several actions. Where the court has both common-law and equity jurisdiction and has the power to bring in other parties interested in the action, it is true that the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force than in a forum having only common-law jurisdiction (*Risley v. Phenix Bank of City of New York*, 83 N. Y. 318, 329), for the reason that the defendant may by appropriate pleading or motion defeat the action or require the presence of the other parties. But this does not change nor weaken in the least the principle that separate suits cannot be brought on the same cause of action to recover parts thereof, and that where one suit has been brought and recovery had for a portion of the claim a subsequent action thereon is barred.

It is argued that this rule is for the protection of the debtor and may be waived by him. This is well settled. (*Carrington v. Crocker*, 37 N. Y. 336.) Thus in *Mills v. Garrison* (3 Keyes, 40) where a party had agreed to purchase four bonds and refused to complete his purchase, but had agreed that if the plaintiff would bring an action in a court of limited jurisdiction and was successful, he would take and pay for the remaining bonds. This was held to be an agreement to waive the protection against dividing an entire cause of action. It has also been held that the rule did not apply in case there was strong suspicion that the action by the assignee was brought with the collusion of the debtor. (*Fourth National Bank v. Noonan*, 14 Mo. App. 243, 247; 88 Mo. 372, 376.) Under such circumstances the court held that by failing to object to the action by the assignee the debtor waived his right to resist a payment in fractions and consented to the partial assignment. It is argued that the same result follows in this case. There would be force in the contention if the debtor had been afforded an opportunity to make his objection in the action by the assignee. The action was in the Municipal Court, which has no equitable jurisdiction, the pleadings were oral, the plaintiff declared on an assigned claim for damages for breach of contract up to March sixth. The terms of the assignment were not disclosed by the pleadings nor by the bills of particulars filed in the case. There was nothing to show that the entire claim had not been assigned, the limitation of the damages "up to March 6" was entirely consistent with a full assignment, if the servant had secured employment from March sixth onward. The defendant could not demur, nor could it plead the partial assignment in defense, for the reason that it had no knowledge thereof. The assignment was put in evidence and for the first time its terms were disclosed. At that stage of the case, its effect was to be considered by the court with the other evidence in the case in arriving at its decision. Clearly, if the court considered this instrument to be a partial assignment he would have dismissed the complaint, as such an assignment is only enforceable in a court of equity. He must, therefore, have determined that it was a legal assignment of the claim. The instrument is capable of such construction. It assigns "All

App. Div.]

First Department, June, 1917.

that certain claim and demand which I have against the Mirror Films, Incorporated, for damages for the breach of its agreement of hiring with me, this assignment covering all damages which have accrued to me, or may accrue up to March 6, 1916, reserving to myself all damages which may accrue after said date." The entire damage accrued upon the breach of the contract, and no damage could accrue thereafter. There was, therefore, nothing reserved out of the assignment. I am of opinion that the determination of the Appellate Term should be reversed and that of the Municipal Court reinstated, with costs.

CLARKE, P. J., and DOWLING, J., concurred; SMITH, J., dissented.

SMITH, J. (dissenting):

In *Risley v. Phenix Bank of City of New York* (83 N. Y. 329) Judge ANDREWS says: "The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well settled rule in this State [citing authorities]. * * * The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action."

This rule was approved and followed in *Chambers v. Lancaster* (160 N. Y. 348) and has never since been questioned in this State.

In *King v. King* (73 App. Div. 547) it was held that an assignee of a one-fifth interest in a promissory note could not maintain a separate action at law to enforce his fractional interest. That the rule is different in equity has been held by this court in *Dickinson v. Tysen* (125 App. Div. 735).

It is undoubtedly true that plaintiff cannot separate an entire claim and sue for a part only without barring his right to sue for the balance. If, however, he assigns part only of his claim it cannot be possible that the assignee may sue the debtor for the part assigned and the assignor be barred

from prosecuting the balance. He is not thus at the mercy of his partial assignee. If the assignee of a part, therefore, sue for his claim the defendant may object that such suit cannot be brought unless he make a party the owner of the balance of the claim that defendant may not be vexed with more than one action. If, however, he joins issue without objection or proceeds with the trial without objection after the fact appears from the evidence that the assignment is only partial he waives his right to have the full claim prosecuted in one action. So in *Dickinson v. Tysen* (*supra*) the opinion referring to the case of *Chase v. Deering* (104 App. Div. 192), in which was sought to be enforced an assignment of a part only of a claim, said: "There the debtor objected to the presence of the other parties to the claim other than the plaintiff. Having raised the objection, and asked that all references in the complaint to the other parties be stricken out, he undoubtedly waived his right to have the whole claim determined by a single action and a judgment would not have been a bar to an action by the owners of the remainder of the claim."

A more serious question arises as to whether all of the claim or a part only thereof was assigned. It will be remembered that the contract with Carvill was terminated by the defendant upon February fifth. At that time, assuming the contract to have been unlawfully terminated, Carvill had his right of action for the full contract price up to the first of the succeeding January, so that all the damage was in fact then due. (*Howard v. Daly*, 61 N. Y. 362.) The assignment assumes to transfer to Jones the damages "for the breach of its [the corporation's] agreement of hiring with me, this assignment covering all damages which have accrued to me, or may accrue up to March 6, 1916, reserving to myself all damages which may accrue after said date." By strict legal construction all of the damage for the breach of the contract might well be deemed to have been thus assigned, but courts endeavor to ascertain the intent of the parties, and if the intent of the parties is apparent upon the face of the instrument, then the court will give effect to the instrument as expressing that intent. In *Howard v. Daly* (*supra*) it is held that the damages in such an action even though the action

App. Div.]

First Department, June, 1917.

be commenced immediately after the breach and before the expiration of the term of the agreed employment "are *prima facie* the amount of the wages for the full term." In the assignment to Jones, Carvill reserved to himself all damages which might accrue after March 6, 1916. It is impossible to give effect to that reservation except by holding that the intention of the instrument was to pass to Jones the right to recover the damages measured by the wages due prior to March 6, 1916, and to reserve to himself the right to recover damages measured by the wages thereafter due. Any other construction of this assignment would seem to me so technical and so at variance with the clear intention of the parties that it would discredit the administration of the law. Jones made no claim for the wages for the year. He interpreted the contract as entitling him only to recover the wages up to March sixth and in his action against the defendant has recovered upon that interpretation. This then is the practical construction given to the contract by both parties thereto, and should be deemed controlling upon the court. Regarding this assignment, then, as an assignment of part of the claim only, the neglect of the defendant to object that Jones could not recover in a separate action without making this plaintiff a party to that action, should, I think, be deemed a waiver of the defendant's right to insist that it be subjected to one action only for the breach of the contract.

In the agreed statement of facts it appears that after the breach of this contract by the defendant the defendant offered the plaintiff employment at the rate of twenty dollars per day, which he refused. If such offer was of similar employment the plaintiff was bound to accept that offer in order that he might diminish his damage, which he was in duty bound to do, but the record does not show that the offer was of a similar employment, nor does it show for what length of time the employment at twenty dollars a day was offered. There are not sufficient facts, therefore, in the agreed statement of facts upon which this case was tried to show that the plaintiff violated any duty to the defendant in failing to diminish the damage which he should suffer by the defendant's breach of the contract. The defendant makes no claim upon

this submission that the right of the plaintiff to recover the full damage is in any way impaired by his failure to accept other employment of a similar nature offered to him.

I recommend, therefore, that the judgment be affirmed, with costs.

Determination of Appellate Term reversed and judgment of Municipal Court reinstated, with costs.

CHARLES W. HUME, Respondent, v. DONALD H. ELDER and MILO M. WELLS, Copartners Doing Business under the Firm Name and Style of ELDER & WELLS, Appellants.

Second Department, June 8, 1917.

Master and servant — negligence — injury caused by sudden starting of team — when servant not engaged in master's business.

Where the servant of the defendant employed to drive an ice wagon stopped and picked up a pail which had fallen from a truck driven by the plaintiff and again stopped his team for the purpose of allowing the plaintiff to reclaim the pail, he was not at the time engaged in his master's business, and hence, where the defendant's servant suddenly started his team with the result that the plaintiff was struck and injured by the whiffletree, the defendant is not liable, for the servant was acting in his own behalf and for his own purposes.

APPEAL by the defendants, Donald H. Elder and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 28th day of December, 1916, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 5th day of March, 1917, denying defendants' motion for a new trial made upon the minutes.

Julian S. Eaton, for the appellants.

George F. Hickey [*Thomas E. Flynn* with him on the brief], for the respondent.

JENKS, P. J.:

The plaintiff, driving a truck in a street, was told that he had dropped a pail carried underneath his truck. He turned

to see a man pick up the pail and get upon an ice wagon. The plaintiff soon stopped his truck, alighted therefrom, waited until the ice wagon came up, stopped it, walked up to it and asked its driver for the pail. The driver told the plaintiff to take the pail. At that time the plaintiff stood between the flank of one of the team of the ice wagon and the whiffletree of that wagon. He reached out his left arm, took hold of the pail, and as he was about to turn to move away the driver whipped up his team and started up his wagon, so that the whiffletree caught the plaintiff's left knee. The plaintiff tripped and fell, so that a forward wheel of the ice wagon passed over his left foot. The plaintiff has received a verdict for damages against the master of the driver of the ice wagon for negligent driving. The version of the defendants differs somewhat from that of the plaintiff, but the finding of the jury warrants us, in this case, to accept that of the plaintiff.

It is undisputed that the sole employment of the driver at this time was to deliver ice to customers of the defendants. When he stopped his wagon to pick up this pail, there is no suggestion that he supposed that it was the property of his master. It cannot be supposed that he thought that he picked up the pail in the course of his employment or in furtherance of his masters' business. The fact that he found the pail while out upon such business did not imply that the masters had any property right to a pail found by the driver in a public street, nor is there any reason to believe that the driver thought to the contrary. On the other hand, such a finding of the pail would have vested the driver with a property right thereto against every one but the owner. (*Amory v. Delamirie*, 1 Str. 505.)

If the driver had not halted in his masters' business to pick up the pail to take possession of it, it is obvious that there would have been no association between him and the plaintiff. The accident then arose from a condition that was entirely foreign to the relation of master and servant between the defendants and the driver. If so, then there is no culpable liability of the master, for the case falls within the principle stated and applied in *Mott v. Consumers' Ice Company* (73 N. Y. 543, 547); *Rounds v. Del., Lack. & West. R. R. Co.* (64 id. 129, 136); *Meehan v. Morewood* (52 Hun, 566;

affd. on opinion below, 126 N. Y. 667); *Magar v. Hammond* (183 id. 387, 390); *Froomkin v. Brooklyn Daily Eagle Co.* (113 App. Div. 443). In Lord Halsbury's *Laws of England* (Vol. 20, p. 256) it is declared, with citation of cases: "Where the servant, in doing the act, was acting on his own behalf and for his own purposes, the master is not liable, even though the opportunity of doing the act arises out of, and is afforded by, the servant's employment."

I advise that the judgment and order be reversed, and the complaint be dismissed, with costs.

STAPLETON, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order reversed, and complaint dismissed, with costs.

In the Matter of the Application of MABEL JONES, for Payment of an Award, etc., in Proceedings to Open West Eleventh Street, from Bay Parkway to Canal Avenue, North, and West Twelfth Street, from Bay Parkway to Kings Highway, etc.

THE CITY OF NEW YORK, Appellant; MABEL JONES, Respondent.

Second Department, June 8, 1917.

Eminent domain — street opening, city of New York — deduction from award for benefits received — foreclosure of mortgage subsequent to condemnation proceedings — respective rights of mortgagor, mortgagee and city.

Where an award on a street opening in the city of New York has been made to a landowner who had previously mortgaged her premises, the city has a right to deduct from the award the amount of an assessment against the owner for the benefit to lands not taken, even though since the vesting of title in the city the mortgage has been foreclosed and a third party has become the purchaser at the sale.

The city was not a party to the foreclosure and its rights were unaffected thereby.

The award for the lands taken stands in the place of the land, and the mortgagee had only an equitable lien thereon to the extent of any deficiency on foreclosure, and where there was no deficiency the entire award belonged to the mortgagor and is subject to assessment for benefits to portions not taken.

App. Div.]

Second Department, June, 1917.

Section 1676 of the Code of Civil Procedure relating to the payment of taxes, assessments, etc., on the foreclosure of a mortgage is solely for the benefit of the purchaser and does not affect any right or remedy of the city with respect to an assessment.

APPEAL by the City of New York from so much of an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 8th day of July, 1916, as disallows a deduction from the award of any assessment levied against the property of petitioner not taken.

Paul Jones [Lamar Hardy, Corporation Counsel, with him on the brief], for the appellant.

Merle I. St. John, for the respondent.

JENKS, P. J.:

Mabel Jones applies for an award for part of her land taken by the city of New York in street opening proceedings. The proceedings resulted in an award for the part taken and in an assessment for benefit to the part left.

Prior to the proceedings, Jones had mortgaged her land. Subsequent to the vesting of the part of the land taken by the city, the mortgage was foreclosed and a third party became the purchaser at the foreclosure sale. It is not clear whether, incidental to the said sale, the assessment was paid. (See Code Civ. Proc. § 1676.) It seems improbable, if it was paid, that the city would seek now to exercise the right of set off of the assessment against the award. The fact can be ascertained in this proceeding (*Matter of Mayor [Morris Avenue]*, 118 App. Div. 122), and it should be.

If the city has the right to set off the assessment against the award, I fail to perceive how the foreclosure suit could affect that right. The city was not a party to the foreclosure, and its rights were unaffected thereby. (*Morgan v. Fullerton*, 9 App. Div. 233. See *Delcambre v. Delcambre*, 210 N. Y. 465.) The award for the land is, in the eye of the law, the land. (*Gates v. De La Mare*, 142 N. Y. 312.) "The paramount right of the city withdrew from the lien of the mortgages" the land condemned, and such land was transferred to the city free and discharged from such lien, and

this status came before the foreclosure sale. (*Matter of City of Rochester*, 136 N. Y. 90.) In that case the court, per FINCH, J., say: "The balance of the land only could be sold and conveyed on the foreclosure; the referee's deed could convey and did convey only that balance; and the right of the mortgagees became merely an equitable lien upon the fund in the hands of the court to the extent of any deficiency which the land sold did not pay." The award was applicable to any deficiency, but as there was none in this case the entire award belonged to the mortgagor. (*Gates v. De La Mare*, *supra*.) If, incidental to the foreclosure, there was payment of this assessment by the referee out of the proceeds of the foreclosure sale, it was equivalent to a payment by the said owner of the equity of redemption. (*Brehm v. Mayor, etc.*, 104 N. Y. 186; *Wiltie Mort. Forec.* [3d ed.] § 684.) Section 1676 of the Code of Civil Procedure is solely for the benefit of the purchaser and does not affect any right or remedy of the city with respect to the assessment. (*Morgan v. Fullerton*, *supra*.)

I am of opinion that the city has the right to set off an assessment for benefit against an award. In *Matter of Steinway Co. v. Prendergast* (142 App. Div. 905) we affirmed the order upon the authority of *Matter of Bankers Investing Co.* (141 id. 591) and said: "We intend hereby to decide that the amount of the assessments without interest, should be offset against the amount which was due for award on the date when the assessments became payable." (See, too, *Matter of Fischer*, 149 App. Div. 618; *Matter of Schoonmaker v. Prendergast*, 171 id. 312.) In *Livingston v. Mayor, etc.* (8 Wend. 102), the chancellor, after discussion of the question of benefits and awards, closes with the proposition with reference to the owner: "It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance, and is assessed for his portion of the damage, or whether the one sum is offset against the other in the first place, and the balance only is allowed." *Livingston v. Mayor of New York* (*supra*) is cited and quoted from as a precedent in this State in *Bauman v. Ross* (167 U. S. 577-588). In *Eldridge v. City of Binghamton* (120 N. Y. 313) the court, per VANN, J., say: "The weight of authority seems to be in

App. Div.]

Second Department, June, 1917.

favor of the proposition that where land is so taken by the State, or by one of its political divisions pursuant to its authority, for public use, the benefits may be set off not only against the damages to the remainder, but also against the value of the part taken. (*Livingston v. Mayor, etc.*, 8 Wend. 85; *Rexford v. Knight*, 11 N. Y. 308; *Granger v. City of Syracuse*, 38 How. Pr. 308; *Genet v. City of Brooklyn*, 99 N. Y. 296; *Betts v. City of Williamsburgh*, 15 Barb. 255; *Birdsall v. Cary*, 66 How. Pr. 358.)" (See, too, *Bohm v. M. E. R. Co.*, 129 N. Y. 586.) If the city set off the assessment against the award, it does so in effect against the land of Jones, for the award is the land. The procedure is, so to speak, not *in personam*, but *in rem*.

I advise that the order be reversed, but without costs, and the matter be remitted to the official referee to determine whether or not the assessment has been paid, and for such other determination as may be proper.

THOMAS, STAPLETON and PUTNAM, JJ., concurred.

Order reversed, without costs, and matter remitted to the official referee to determine whether or not the assessment has been paid, and for such other determination as may be proper.

LOUIS KELLNER, Respondent, v. PATRICK J. SHELLEY,
Appellant.

LOUIS KELLNER, Respondent, v. JOSEPH J. WESLEY, Appellant.

LOUIS KELLNER, Respondent, v. CHARLES L. EIDLITZ,
Appellant.

Second Department, June 8, 1917.

Corporations — inspection of stock book of foreign corporation — officers not liable for statutory penalty when stock book is not within State.

The officers of a foreign stock corporation, not a moneyed or railroad corporation, but having an office in this State, are not liable to the penalty prescribed by section 33 of the Stock Corporation Law for a failure to permit a stockholder to inspect the stock book of the corporation, if it

appears that the stock book was not within the State at the time the demand for an inspection was made, or at any time, except for a brief period on the reorganization of the company.

APPEAL by the defendants, Patrick J. Shelley and others, in each of the above actions, from determinations and orders of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of Kings on the 29th day of December, 1916, affirming in each case the judgment of the Municipal Court of the City of New York, borough of Brooklyn, third district, in plaintiff's favor.

Frederick Hulse [*Cornelius J. Sullivan, Jr.*, with him on the brief], for the appellants.

George A. Gregg, for the respondent.

STAPLETON, J.:

The Appellate Term of the Supreme Court affirmed the judgments of the Municipal Court in favor of the plaintiff, and, leave being given, appeals are taken from the judgments of affirmance.

The Metropolitan Electric Manufacturing Company, a foreign stock corporation, and not a moneyed or a railroad corporation, is incorporated under the laws of the State of New Jersey, and has its principal office in Camden in that State. In the borough of Queens, in this city and State, it has an office and a factory. The defendant Shelley is its treasurer; the defendant Wesley is its secretary, and the defendant Eidlitz its president. The plaintiff, a stockholder, made, on separate occasions, during business hours, a demand on each of the defendants for an inspection of the stock book. The demand was made by virtue of section 33 of the Stock Corporation Law (Laws of 1909, chap. 61, constituting Consol. Laws, chap. 59), which, prior to the amendment effected by chapter 127 of the Laws of 1916, and which was a law at the time of the demand, read as follows:

"Stock books of foreign corporations. Every foreign stock corporation having an office for the transaction of business in this State, except moneyed and railroad corpora-

App. Div.]

Second Department, June, 1917.

tions, shall keep therein a book to be known as a stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. Such stock book shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, and any officer of the State authorized by law to investigate the affairs of any such corporation. If any such foreign stock corporation has in this State a transfer agent, whether such agent shall be a corporation or a natural person, such stock book may be deposited in the office of such agent and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder, judgment creditor or officer of the State authorized by law to investigate the affairs of such corporation. For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars to be recovered by the person to whom such refusal was made."

The plaintiff sued the corporation, and recovered. That judgment is not before us for review.

The duty to keep the book is imposed on the corporation. There is neither allegation nor proof that when the demands were made upon the defendants respectively they had the custody or control of the stock book, or that one was kept in the office of the corporation within this State. The evidence is that the stock book was not within the State at the time the demands were made, or at any time except on the occasion of the reorganization of the company in 1915, when it was brought over from Camden by a Mr. Jones, the Camden representative. It was taken back by him to Camden on the same day, and since that time it has never been in New York. The plaintiff's testimony that he "knew" it was kept here because on that occasion he signed it, is not probative.

Officers of a corporation who have not the stock book in their custody or control may not be penalized for failing to allow it to be inspected. The Appellate Term in the First Department, in a case substantially similar, has made

a like determination. (See *Gould v. Olympic Mining Company*, 49 Misc. Rep. 612.)

The judgments of the Appellate Term and of the Municipal Court of the City of New York should be reversed, and a new trial ordered in the Municipal Court, costs to abide the event.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concurred.

In each case: Judgment of the Appellate Term and of the Municipal Court of the City of New York reversed, and a new trial ordered in the Municipal Court, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
SAMUEL SIMON, Alias HARRY FRIEDMAN, etc., Appellant.

Second Department, June 8, 1917.

Crime — indictment for felony as second offense — plea of guilty as first offender — when defendant not entitled to indeterminate sentence.

A defendant indicted for the crime of grand larceny, first degree, as a second offense, by pleading guilty to the charge as a first offense is not entitled to an indeterminate sentence under section 2189 of the Penal Law, where on an examination pursuant to section 485-a of the Code of Criminal Procedure he admits that he had been previously convicted of a felony. By such plea of guilty he escaped the additional punishment which would follow an indictment and conviction as a second offender, but he did not become entitled to the clemency of an indeterminate sentence which the law expressly reserves for a person never before convicted.

APPEAL by the defendant, Samuel Simon, from a judgment of the County Court of Kings county, entered in the office of the clerk of said county on the 18th day of December, 1916, convicting him of the crime of grand larceny in the second degree.

Frank X. McCaffry, for the appellant.

Harry G. Anderson, Assistant District Attorney [*Harry E. Lewis*, District Attorney, with him on the brief], for the respondent.

STAPLETON, J.:

The appellant was indicted for the crime of grand larceny, first degree, as a second offense, two previous offenses, one a misdemeanor and the other a felony, being enumerated. Upon arraignment he interposed a plea of not guilty. Later, in open court, and with the approval of the learned county judge presiding, and the district attorney, he withdrew the plea of not guilty and pleaded guilty to the crime of grand larceny, second degree, as a first offense. In his examination, made pursuant to section 485-a of the Code of Criminal Procedure, he said he had previously been convicted of a felony. When he was about to be sentenced his counsel moved that the court confine the sentence to such a sentence as it would impose upon a first offender. The court declined the request, and imposed a sentence of five years in the State prison. This is the maximum punishment for grand larceny in the second degree as a first offense. (Penal Law, § 1297.)

In appealing the defendant contends that the court erred in sentencing him for a fixed period of five years instead of imposing an indeterminate sentence of not less than one nor more than five years, under section 2189 of the Penal Law, which reads: "A person never before convicted of a crime punishable by imprisonment in a State prison, who is convicted in any court in this State of a felony other than murder first or second degree, and sentenced to a State prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted."

Had the defendant been indicted for grand larceny in the second degree, without any allegation as to a second offense, and pleaded guilty, the sentence would be lawful, and the fact of the prior conviction properly ascertained. (*People v. Rosen*, 208 N. Y. 169.) There is no sound distinction in the circumstance that he expressly pleaded guilty as a first offender to a lesser crime than that charged in the indictment. By his plea he escaped the additional punishment

which would follow indictment and conviction as a second offender. He was not entitled to the clemency of an indeterminate sentence, which the law expressly reserves for a person never before convicted.

The judgment of conviction of the County Court of Kings county should be affirmed.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment of conviction of the County Court of Kings county affirmed.

GEORGE BAGDON, Respondent, v. PHILADELPHIA AND READING COAL AND IRON COMPANY, Appellant.

Second Department, June 8, 1917.

Court — jurisdiction — action by non-resident against foreign corporation — Code Civil Procedure, section 1780, construed — discretionary power of court to decline jurisdiction — pleading — demurrer — answer alleging that defendant will induce court to decline jurisdiction.

The amendment to section 1780 of the Code of Civil Procedure which permits a non-resident to sue a foreign corporation in the courts of this State, under certain conditions, did not take away the power of our courts to decline jurisdiction on the ground of *forum non conveniens*, or other reasons rendering a trial here inexpedient.

Hence, a demurrer should not be sustained to a defense set up by a foreign corporation sued by a non-resident which alleges non-residence, alienage and that the defendant is not an inhabitant of the State, and which gives notice that facts will be shown which should lead the court to decline jurisdiction.

MILLS and RICH, JJ., dissented.

APPEAL by the defendant, Philadelphia and Reading Coal and Iron Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 2d day of November, 1916, sustaining a demurrer to certain defenses contained in the answer.

Pierre M. Brown [*William F. Purdy* with him on the brief], for the appellant.

Ralph G. Barclay, for the respondent.

PUTNAM, J.:

This demurrer raises the important question of the power of a State court to decline jurisdiction on the ground of *forum non conveniens*, or other reason rendering a trial here inexpedient. There is the more cause for the exercise of this inherent power because of the jurisdiction of the Federal courts for such suits by non-residents against foreign corporations. (*Barrow Steamship Co. v. Kane*, 170 U. S. 100.) This complaint does not aver that plaintiff resides in this State. In fact the "presumption of continuance" would lead to the view that he still resides in Shenandoah, Penn.

While the amendment (Laws of 1913, chap. 60) of the Code of Civil Procedure, section 1780, conferred on our courts jurisdiction, the defendant may nevertheless show reasons why Pennsylvania is the natural forum, as the place where the cause of action arose. This power to decline jurisdiction (*Collard v. Beach*, 81 App. Div. 582; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315) has not been taken away by the 1913 amendment of section 1780. (*Waisikoski v. Philadelphia & Reading C. & I. Co.*, 173 App. Div. 538.) The 9th paragraph, demurred to, avers facts such as non-residence, alienage, and not an inhabitant here. Under the allegation of alienage, it might well be that plaintiff may be shown as an alien enemy. The answer gives notice that defendant will show facts that should lead this court to decline jurisdiction. Certainly such a notification informing plaintiff that such application will be presented to the discretion of the court, should be sustained on this demurrer. Being a question of fact, it cannot be certainly told, now, that this plea will be "insufficient in law."

Hence I advise that the interlocutory decree be reversed.

JENKS, P. J., and THOMAS, J., concurred; MILLS and RICH, JJ., dissented.

Interlocutory judgment reversed, and demurrer to the separate defense contained in paragraphs 4 and 7 of defendant's answer overruled, with ten dollars costs.

LORETTA KELLY, an Infant, by FRANK L. KELLY, Her Guardian ad Litem, Respondent, v. CYRUS V. WASHBURN and GEORGE W. SICKLES, Appellants.

Second Department, June 8, 1917.

Real property — negligence — liability of owner for injuries resulting from failure to protect foundation exposed by excavation — sale of house to wrecking company — conveyance not recorded until after accident.

Where a building and its foundations abutting upon a public street have been put in a dangerous condition by reason of a deep excavation made for the purpose of lowering the street grade to pass under a bridge, the owner does not escape liability for injuries to a pedestrian who, while lawfully upon the sidewalk, was struck by a stone which fell from the foundation, merely because after the excavation he has sold the building to a wrecking company so as to constitute a legal severance of the building from the land.

Quare, as to whether the liability would exist if the menace from the building began after such legal severance from the land.

Likewise, the owner of an undivided interest in the land does not escape liability by a deed executed before, but not recorded until after, the accident.

APPEAL by the defendants, Cyrus V. Washburn and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 18th day of October, 1916, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 2d day of November, 1916, denying defendants' motion for a new trial made upon the minutes.

Plaintiff, a child six years old, received personal injuries from being struck by a large stone which rolled down on her from premises at 115 Sands street, owned by the defendants, or at least one of them, on April 14, 1914. By lowering the grade of Sands street some nine and one-half feet so as to pass under Manhattan bridge, a high bank had been left in front of this house, the stoop of which had been taken off, so that the top step, at what had been the front entrance, had been supported by needle beams. The light soil of the yard had washed down the sloping bank, and away from the foundation

App. Div.]

Second Department, June, 1917.

walls. The testimony indicated that it was one of these foundation stones, estimated to weigh seventy pounds, which rolled down upon plaintiff then lawfully on the sidewalk.

Defendants had purchased the property, which then had stood unoccupied, on January 27, 1914. On March fourth, some forty days before this accident, defendants had sold the building structure to house movers, by an instrument purporting to pass the title to the severed building, with a further provision that the purchasers should begin demolition on or before March 30, 1914. The appellant Washburn had deeded away his undivided interest in this land by instrument acknowledged March 10, 1914, which, however, was not recorded till the afternoon of the day of this accident. The case went to the jury on the theory of negligence.

Andrew F. Van Thun, Jr., for the appellant Cyrus V. Washburn.

Vine H. Smith, for the respondent.

PUTNAM, J.:

This contract of March fourth passed title to the *building* on signing and delivery of that instrument. There was a legal severance of the building from the land, and the house-wreckers were at once vested with title to the building. (*Melton v. Fullerton-Weaver Realty Co.*, 214 N. Y. 571.)

The liability having been left to the jury on the theory of negligence, appellants contend that, therefore, it was necessary to show that at the time of the accident the premises were under their control, with a continuing legal duty on them to use care.

Although prior to the accident defendants had sold the building to be demolished and removed, such severance of the title to that building did not release the landowner from any existing liability for a dilapidated structure so unsafe as to threaten the wayfarer on the public street. We are not called on to pass on the landowner's liability where the danger and menace from the building begins after its legal severance from the land. Even the deed of one defendant's undivided interest in the land did not exonerate such owner from liability, if the subsequent accident happened because

of his want of care before delivery of the deed. Negligence of this degree becomes similar to the cause of action for nuisance, because its effect may be a direct danger to the public. (*Junkermann v. Tilyou Realty Co.*, 213 N. Y. 404, 408.)

There being no error in the rulings or the charge, I advise that the judgment and order should be affirmed, with costs.

Present — JENKS, P. J., STAPLETON, MILLS and RICH, JJ.

Judgment and order unanimously affirmed, with costs.

JOSEPH BLANK, Appellant, v. MARINE BASIN COMPANY, INC.,
Respondent.

Second Department, June 8, 1917.

Ships and shipping — distinction between liability of wharfinger for merchandise and where he rents wharfage privilege — when wharfinger not liable for theft of motor boat — evidence — custom of other wharfingers.

The liability of a wharfinger *quoad* merchandise, a familiar kind of bailment, is quite different from the liability of a wharfinger charging "wharfage," which latter is like rent — a compensation for the use and occupation of a pier or bulkhead.

Thus, the owner of a marine dock or basin is not liable for the theft of a motor boat where the owner merely rented the privilege of mooring the craft in the basin and fastened it with a padlock of which he kept the key and where he was accustomed to take the boat from the basin whenever he desired without notifying the defendant of his departure or return, especially so where the complaint merely alleges a demand and refusal after the launch had been stolen, and does not plead any fault or negligence of the defendant.

In such action defendant's proof of usage in other yacht basins was competent on the issue of an implied contract.

APPEAL by the plaintiff, Joseph Blank, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 12th day of January, 1917, dismissing the complaint on the merits upon

App. Div.]

Second Department, June, 1917.

the decision of the court after a trial before the court, the jury having been waived.

Walter J. Rose, for the appellant.

J. Hunter Lack, for the respondent.

PUTNAM, J.:

Defendant conducted a marine dock or basin near Hubbard street, Gravesend Bay, Brooklyn, for the wharfage of motor boats and other navigable craft. It had also a warehouse with facilities for storage. The basin was oblong in shape, without gates, having an open entrance seaward seventy-five feet in width.

In July, 1912, plaintiff entered this marine basin and tied up his gasoline motor launch there, with two lines which led to mooring posts. The lines apparently were padlocked. He then went to the superintendent's office and arranged for paying four dollars and twenty cents a month summer and winter, that is, while in the water and on shore, with a charge of six dollars for "hauling in and out." Plaintiff kept the key. Coming to the basin occasionally in the course of the season, he took out the launch for short cruises. In the winter the launch was hauled out upon the land. The boat also was used in this way in the season of 1913 and 1914, also on the preceding Sunday before the boat was missing on August 26, 1914. Plaintiff showed a demand and refusal, but the complaint did not aver any negligence.

The court's findings that defendant's monthly charge was only for the privilege of mooring in the basin; that plaintiff never reported to the defendant either his departure or arrival, or otherwise notified defendant of the presence or absence of said launch in said basin, or requested defendant to take custody thereof, though expected to, are sustained by proof of the plaintiff's acts, and the general custom in such yacht basins. The court also found that prior to August twenty-seventh the boat disappeared and "has not since been seen or heard of."

The liability of a wharfinger *quoad* merchandise, which is a familiar kind of bailment, is quite different from the liability of a wharf owner charging "wharfage," which latter is like

rent, "being a compensation for the use and occupation of a pier or bulkhead." (*Hastorf v. Kelly*, 9 Daly, 403, 405.)

The undenied fact that plaintiff and his friends kept the keys of this launch, and went out and in, without reporting to defendant's employees, goes to negative any such possession by defendant, or *locatio custodiae*, as might call on the defendant to account for the boat's disappearance. Defendant's proof of the usage in other yacht basins was competent on the issue of any implied contract. The finding that defendant was a bailee for hire was rather in the nature of a conclusion of law, which did not defeat the court's specific findings as to the terms of the arrangement for mooring in the basin.

The eighth finding of fact, however, should be changed so as to strike out the last five words, and substitute "as a vessel berthed therein, for which plaintiff was paying wharfage for such occupation."

The first conclusion of law should be stricken out, and a new conclusion of law inserted: "Defendant's charge of wharfage for plaintiff's mooring his launch in defendant's basin did not involve taking over or assuming the legal custody thereof while in such basin."

In the circumstances, defendant was not liable for this disappearance of the launch, especially under a complaint which only alleged a demand and refusal after the launch had been taken away, without pleading any fault or negligence. On the testimony, the court rightly exonerated the defendant from any negligence.

The judgment of dismissal should, therefore, be affirmed, with costs.

JENKS, P. J., STAPLETON, RICH and BLACKMAR, JJ., concurred.

Judgment affirmed, with costs. Order with amended findings to be settled on notice.

BONAVENTURE F. BRODERICK, Respondent, v. HANNIBAL J.
DE MESA, Appellant.

Second Department, June 8, 1917.

**Trial — venue — action between non-residents — when venue will
be changed from rural to metropolitan county.**

The rule that the court will not change a place of trial to promote the ends of justice from a rural to a metropolitan county does not obtain where neither of the parties is a resident of this State and where although the venue has been laid in a rural county, as a matter of fact both parties and their attorneys and most of the witnesses reside in the county of New York. The venue will be changed to the latter county where it will serve the convenience of witnesses, bring the trial to the county where the transaction took place and there will be no substantial delay because of the condition of the calendar, so that the ends of justice will be promoted. MILLS, J., dissented.

APPEAL by the defendant, Hannibal J. de Mesa, from an order of the Supreme Court, made at the Dutchess Special Term and entered in the office of the clerk of the county of Dutchess on the 23d day of April, 1917, denying a motion to change the place of trial from Dutchess county to New York county for the convenience of witnesses and to promote the ends of justice.

Albert Stickney, for the appellant.

Charles Morschauser [*Raoul E. Desvernine* with him on the brief], for the respondent.

BLACKMAR, J.:

As neither of the parties is a resident of the State, the plaintiff designated the county of Dutchess as the place of trial pursuant to section 984 of the Code of Civil Procedure. No witness resides or has a place for the transaction of his business in that county. The attorneys for both parties have their offices in the city of New York. Most of the transactions which form the subject of the action took place in New York county. Six witnesses either live or have an office for the regular transaction of business in New York county. Upon a showing of these facts defendant moved to change the place

of trial to New York county. The motion was successfully opposed, apparently on the ground that it would not promote the ends of justice to change the place of trial from a rural to a metropolitan county, and the plaintiff seeks to sustain the order on that ground, citing *Quinn v. Brooklyn Heights R. R. Co.* (88 App. Div. 57); *Hirshkind v. Mayer* (91 id. 416); *Assets Collecting Co. v. Equitable Trust Co.* (168 id. 145). In none of these cases, nor in any cited therein, have the courts gone so far as to apply that rule to a case like this. The rule usually has been applied to a question between neighboring counties like Westchester or Queens and New York, where one court house is nearly as convenient as the other. (*Quinn Case, supra*; *Brink v. Home Insurance Co.*, 2 App. Div. 122. See *Navratil v. Bohm*, 26 App. Div. 460; *Daley v. Hellman*, 16 N. Y. Supp. 689.) As was said in *Tuthill v. Long Island R. R. Co.* (75 Hun, 556): "The reason [for the rural county rule] is that the court calendars in those cities are large and the uncertainties of a trial are so great that a litigant whose witnesses reside in the country encounters delays and expenses which would ordinarily deter him from the pursuit of his rights." The condition of the calendars in the metropolitan counties, especially for contract cases, are now far different, and in this case there are no witnesses residing in Dutchess county to encounter delays and expenses in attending court in New York.

We think a case was made out for a change of the place of trial even from a rural county to New York. Such a change will serve the convenience of all the witnesses, and by bringing the trial to the county where the transaction which will be the subject of inquiry took place, and where the condition of the calendar will not cause substantial delay, the ends of justice will be promoted.

The order is reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

JENKS, P. J., STAPLETON and PUTNAM, JJ., concurred; MILLS, J., voted to affirm.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

App. Div.]

Second Department, June, 1917.

KATHERINE S. BRYER, as Administratrix, etc., of MARY CARROLL, Deceased, Plaintiff, v. MARY FINNEN, TIMOTHY FINNEN and Their Heirs, Respondents, Impleaded with ELLEN FINNEN and ANN FINNEN, Appellants.

Second Department, June 8, 1917.

Will construed — gift to widow for life with remainders to nephews and nieces — when remainders not vested but contingent upon remaindermen surviving widow — foreclosure — distribution of surplus.

A will by which the testator gives his estate to his widow for life and at her death directs his property to be converted into cash and the proceeds divided between his nieces and nephews and the survivor or survivors of them, share and share alike, and to their "heirs and assigns forever," does not give to the nieces and nephews a vested remainder in the realty during the lifetime of the widow.

As there was a direction to pay or divide the estate at a future time there was no immediate gift, and the vesting of the remainders in the beneficiaries does not take place until the time of the division arrives.

The rule against a construction which will disinherit heirs is usually applied to those nearer in blood than grandnephews and grandnieces and rests upon the presumption that the testator intends a bounty to his descendants. Hence, the descendants of nephews and nieces who died before the widow are not entitled to share in a distribution of surplus arising on a sale on foreclosure.

The will will be construed as aforesaid although the testator devised to "the heirs and assigns" of the nephews and nieces.

APPEAL by the defendants, Ellen Finnen and another, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 4th day of January, 1917, resettling an order entered on the 4th day of December, 1916, confirming the report of a referee which directed the distribution of a surplus arising on a sale under foreclosure of mortgaged premises.

Arthur L. Fullman, for the appellants.

Sumner B. Stiles [*Prosper R. Ferrari* with him on the brief], for the respondents.

BLACKMAR, J.:

To sustain this order it is necessary to hold that the will of the testator gave a vested remainder in the realty to the four nephews and nieces which they could alienate and devise during the lifetime of the widow, for a portion of the surplus is awarded to those who derive title partly through the will of the nephew Timothy and partly as "heirs and next of kin" of the niece Mary, both of whom died during the life of the widow, the owner of the particular estate.

We do not think the will capable of such construction. The only portion of the will set forth in the record is as follows: "All the rest, residue and remainder of my property, both real and personal, of whatsoever nature or kind the same may be, I give, devise and bequeath to my said wife, Mary, for and during her natural life and after her death I direct that my real estate be sold and the personal property be converted into cash and the proceeds thereof be divided among my nieces and nephews Timothy Finnen, Ellen Finnen, Mary Finnen, and Ann Finnen, and the survivor and survivors of them share and share alike and to their heirs and assigns forever."

The widow received a life estate. There was no gift in terms of a remainder. But the will contained a direction to sell the land after the termination of the particular estate, and divide the proceeds among the objects of the testator's bounty. The rule is well settled that where there is no gift but by a direction to pay or divide at a future time, the vesting in the beneficiary will not take place until the time arrives. (*Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 id. 92, 104; *Teed v. Morton*, 60 id. 506; *Dickerson v. Sheehy*, 156 App. Div. 101; *affd.*, 209 N. Y. 592.)

As futurity is annexed to the substance of the gift, none can take except those designated by the will as qualified to take at the time of the division. The proceeds of the sale of the land are, by the terms of the will, to be "divided among my nieces and nephews Timothy Finnen, Ellen Finnen, Mary Finnen, and Ann Finnen, and the survivor and survivors of them share and share alike and to their heirs and assigns forever." It is inaccurate to speak of dividing proceeds between nephews and nieces "and" their survivors. The

only way in which effect can be given to the words "survivor and survivors" is to read the word "and" with the meaning of "or," and this is often done to carry into effect the obvious intent of the testator. (*Miller v. Gilbert*, 144 N. Y. 68; *Roome v. Phillips*, 24 id. 463; *Scott v. Guernsey*, 60 Barb. 163; *affd.*, 48 N. Y. 106.) As, on the death of the widow, Ellen and Ann were the only survivors of the four, they are evidently indicated as objects of the testator's bounty. The following words, "and to their heirs and assigns forever," still present difficulties; but, as these words are so frequently used as words of limitation and not purchase, as to be familiar to every one who, without being a skilled lawyer, has some familiarity with legal phraseology, we incline to think that the testator used them to show the absolute nature of the gift, inapt to a gift of personalty as they are. This is also the accurate grammatical construction, the pronoun "their" being related to the nearest preceding noun, "survivors."

The rule against a construction which will disinherit heirs is usually applied to those nearer in blood than grandnephews and grandnieces, and rests upon the presumption that a testator intends a bounty to his near relatives, usually descendants. We do not think that his intention to include grandnieces in the scheme of his will as against surviving neices is so strong as to induce a strained interpretation of the will. (*Goodwin v. Coddington*, 154 N. Y. 283.)

The order is modified by directing that the surplus moneys be paid to Ann Finnen, or Mealiff, and Ellen Finnen, share and share alike; and as modified affirmed, with costs of this appeal to be paid to both appellants and respondents out of the fund before division thereof.

JENKS, P. J., STAPLETON, MILLS and PUTNAM, JJ., concurred.

Order modified by directing that the surplus moneys be paid to Ann Finnen, or Mealiff, and Ellen Finnen, share and share alike; and as modified affirmed, with costs of this appeal to be paid to both appellants and respondents out of the fund before division thereof.

WITTEMANN BROTHERS, Appellant, v. FORMAN BOTTLING
COMPANY and Others, Respondents.

Second Department, June 8, 1917.

Appeal — trial — when dismissal of complaint should not be made upon merits — debtor and creditor — suit to set aside fraudulent conveyances — evidence — mortgage upon property conveyed executed after conveyance — evidence of fraudulent intent — *lis pendens* — cancellation of notice.

An appeal does not lie from a decision of the court, but only from the judgment which carries it into effect.

But on appeal from an "order" which dismisses the complaint for failure of proof at trial the court may treat the appeal as one taken from a judgment.

Where a complaint was dismissed at the end of the plaintiff's case it was error for the court to make findings of fact upon issues as to which the defendants had the burden of proof and which were not tried.

The judgment should be one of nonsuit where the defendants moved to dismiss the plaintiff's case without announcing that they rested, and no findings of fact or determination on the merits should have been made.

In a judgment creditor's action to set aside a conveyance alleged to have been fraudulent it was error for the court to exclude evidence offered by the plaintiff to show that after the conveyance the defendants gave two chattel mortgages to other parties on the property conveyed. This because proof of contemporaneous conveyances, no matter to whom made, is always relevant to an issue of fraudulent conveyance.

Evidence of the circumstances under which conveyances are made and the consideration paid therefor, is also relevant on the issue of fraudulent intent.

In granting the nonsuit it was error to cancel the plaintiff's notice of pendency of action before the time to appeal had expired or pending the appeal, for in such action the notice can only be canceled by order of the court upon payment into court, or upon giving the security required by section 1674 of the Code of Civil Procedure.

APPEAL by the plaintiff, Wittemann Brothers, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 11th day of May, 1916, dismissing the complaint and directing the cancellation of a *lis pendens*, and also, as stated in the notice of appeal, from the decision of the court filed in said clerk's office on the same day.

Clifford H. Owen, for the appellant.

Jacob Zelenko [*Leon Sanders* with him on the brief], for the respondent *Levi Merowitz*.

BLACKMAR, J.:

We find in the papers two notices of appeal, one from an "order" which dismisses the complaint on the trial for failure of proof and cancels a notice of pendency of action, and the other from the decision of the justice who tried the action. An appeal does not lie from a decision, but only from the judgment which carries it into effect, and the so-called "order" was in effect a judgment and this appeal will be considered as taken from a judgment.

The complaint was dismissed at the end of the plaintiff's case, and thereafter the justice who presided at the trial made findings of fact, not only upon the issue to which plaintiff's evidence was directed, but upon an issue as to which defendant had the burden of proof and which was not tried, and directed judgment dismissing the complaint. The judgment was one of nonsuit, for the defendants moved to dismiss at the end of plaintiff's case without announcing that they rested. No finding of fact, as upon a determination on the merits, should have been made. (*McNulty Brothers v. Offerman*, 141 App. Div. 730; *Kling v. Corning News Co.*, 208 N. Y. 334.) The judgment will be reviewed, therefore, as one of nonsuit entitling the plaintiff to all inferences in his favor which the evidence will bear. (*Veazey v. Allen*, 173 N. Y. 359.)

The action was brought by plaintiff, a judgment creditor of the defendant Forman Bottling Company, to set aside a conveyance by that defendant to defendant Merowitz, on the ground that it was fraudulent as to creditors. The evidence offered by plaintiff was very scanty. It was confined to proof of the judgment in an action pending at the time the conveyance was made, and the issuance and return of an execution unsatisfied; the conveyance; evidence that grantee bore some relation to officers of the grantor, and slight evidence that the grantor continued in business on the property after the conveyance. Although the plaintiff could

make a *prima facie* case by introducing evidence tending to show the fraudulent intent of the grantor only (*Starin v. Kelly*, 88 N. Y. 418), yet it is doubtful if the slight evidence introduced was enough, even under the case of *Kerker v. Levy* (206 N. Y. 109), to furnish the basis for an inference of fraudulent intent. But an error in excluding evidence requires a new trial, at which the circumstances relevant to the question of fraudulent intent may be more fully developed. The conveyance claimed to be fraudulent was dated January 30, 1915, and recorded February 3, 1915. The plaintiff offered to prove that on January 27, 1915, the defendant Forman Bottling Company made two chattel mortgages, each to secure the payment of \$2,000 covering chattels situated at 108 Bristol street. The evidence was rejected on the ground, as stated by the court, "that the complaint does not allege that the property purporting to be covered by these chattel mortgages ever came into the possession of or under the control of the defendants in this action, or were attached to or part of the property of which it is sought by this action to divest the defendants' record title." To this ruling the plaintiff duly excepted. Proof of contemporaneous conveyances, no matter to whom made, is always relevant to the issue of a fraudulent conveyance. (*Baldwin v. Short*, 125 N. Y. 553; *Amsden v. Manchester*, 40 Barb. 158; *Angrave v. Stone*, 45 id. 35.) They often furnish convincing evidence that the conveyance in question was part of a comprehensive scheme to divest the debtor of all his property in fraud of his creditors. Not only is evidence of such conveyances relevant, but evidence of the circumstances under which they are made and the consideration paid therefor is also relevant to the issue of fraudulent intent. This rule extends to all conveyances so nearly related in time as to permit the inference that they arose from the same source of intent. Such was the case of the conveyances in question. The exclusion of evidence of these mortgages was material error, and for such error the judgment must be reversed. It was also error to cancel the notice of pendency of the action before the time to appeal had expired, or pending the appeal. (Code Civ. Proc. § 1674; *Beman v. Todd*, 124 N. Y. 114; *St. Regis Paper Co. v. Santa Clara Co.*, 62 App.

App. Div.]

Second Department, June, 1917.

Div. 538.) In such a case a notice of pendency of action, in a judgment creditor's action, can be canceled only by order of the court upon the payment into court or giving the security required by the last cited section of the Code.

The judgment and order directing the canceling of the notice of pendency of action should be reversed, and a new trial granted, with costs to the appellant to abide the event, and the notice of pendency of action restored *nunc pro tunc*.

JENKS, P. J., STAPLETON, MILLS and PUTNAM, JJ., concurred.

Judgment and order directing the canceling of the notice of pendency of action reversed, and a new trial granted, costs to appellant to abide the event, and the notice of pendency of action restored *nunc pro tunc*.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE MISSES MASTERS SCHOOL, Respondent, v. WALTER KEYS and Others, as Assessors of the Town of Greenburgh, Westchester County, New York, Appellants.

Second Department, June 22, 1917.

Tax — when educational institution entitled to exemption — discretionary power of trustees to pension teachers and officers.

Where the charter of an educational corporation provides that its resources shall be devoted to educational work without right of pecuniary gain beyond reasonable compensation for services rendered, it is none the less entitled to exemption from taxation under the provisions of the Tax Law because the charter also provides that the board of trustees have discretionary power to make pensions or other merited allowances to teachers, officers or employees out of the surplus earnings.

Such discretionary power to make pensioning and other merited allowances does not offend the prohibition against making pecuniary profit.

"Profits" means gain made from any business or investment when both receipts and payments are taken into account, and a pension being compensation as a reward for labor already done is essentially different from a "profit."

APPEAL by the defendants, Walter Keys and others, as assessors, from part of the order of the Supreme Court, made

at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 1st day of June, 1917, adjudging certain realty exempt from taxation.

Frank D. Briggs [*Joseph B. Thompson* with him on the brief], for the appellants.

Daniel S. Remsen, for the respondent.

PER CURIAM:

This appeal presents a review by certiorari of taxes upon the realty of a school. Only questions of law are presented.

The Tax Law prohibits exemption "if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes." (Consol. Laws, chap. 60 [Laws of 1909, chap. 62], § 4, subd. 7, as amd. by Laws of 1916, chap. 411.) The amended charter of the school, granted by the Regents, provides: "The school and its resources shall be devoted to authorized educational work for public usefulness, without right of pecuniary gain therefrom, by any one, beyond reasonable compensation for services rendered." The corporation acquired its property March 24, 1916, by conveyance from the Masters School Realty Company, and paid nothing for it, for the consideration was paid by the Misses Masters. The return shows: "That the said amended charter of relator, provides among other things as follows: 'The School and its resources shall be devoted to authorized educational work for public usefulness, without right of pecuniary gain therefrom, by any one, beyond reasonable compensation for services rendered but with discretionary power in its board of trustees, out of surplus earnings to make pensioning and other merited allowances to teachers and other officials and employees of the School.'"

Does the additional phrase, "but with discretionary power in its board of trustees, out of surplus earnings to make pensioning and other merited allowances to teachers and other officials and employees of the School," offend the prohibition against "any pecuniary profit?" This institution is fairly

App. Div.]

Second Department, June, 1917.

within the description made by the court in *McDonald v. Massachusetts General Hospital* (120 Mass. 432, 435). "Profits" means the gain made from any business or investment when both receipts and payments are taken into account. (*Matter of Murphy*, 80 App. Div. 238; *Rubber Company v. Goodyear*, 76 U. S. [9 Wall.] 788, 804.) A pension is a bounty for past services, mainly designed to assist the pensioner in providing for his daily wants. (*Price v. Society for Savings*, 64 Conn. 362.) It is in the nature of a compensation for labor done and as a reward therefor, and is essentially quite different from "profits" — the gain upon investments or business done. We think that "pensioning and other merited allowances to teachers and other officials and employees of the School" are within the purview of "reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes," rather than of "pecuniary profit," as the phrases are used in the tax statute.

All public educational institutions originally (Temp. Eliz. St. 43) were within the category of eleemosynary institutions. A gift to Harvard University was one to a charitable institution. (*Dexter v. Harvard College*, 176 Mass. 192. See, too, *People ex rel. New York Institute for Blind v. Fitch*, 154 N. Y. 14, 30, 31.) So far as the question of rents received, our discussion of a similar question raised in *People ex rel. Trustees v. Mezger* (98 App. Div. 237) is pertinent to this case.

The order, in so far as appealed from, is affirmed, but without costs.

JENKS, P. J., THOMAS, MILLS, PUTNAM and BLACKMAR, JJ., concurred.

Final order, in so far as appealed from, affirmed, without costs.

CHARLES H. TIBBITS, Respondent, v. JULIUS M. COHEN, Appellant, Impleaded with FRANK KLEIN, Respondent, Appellant, and CARLO FLORIO and S. H. GRAHAM, INC., Respondents.

Second Department, June 23, 1917.

Contract — building contract construed — substantial performance — mechanic's lien — foreclosure.

A building contractor undertook to perform work to conform to architect's plans and specifications and also to abide by the architect's decision in the event of any error or difficulty in the specifications. The architect was discharged and the owner undertook to complete the agreement substituting himself as his own architect. At a meeting of the parties to test a heating plant the contractor made a substantial offer for the substitution of a larger boiler with a further sum for other matters in issue and the owner after stating that he would take the proposition under consideration failed to answer the offer and subsequently notified the general contractor that he considered the contract as abandoned and would himself complete the same.

In an action to foreclose a mechanic's lien, *held*, that in the circumstances there was a substantial performance; that the percentage rule has no application, and that the lienor was properly decreed what was equitably due him.

SEPARATE APPEALS by the defendants, Julius M. Cohen, as owner, and Frank Klein, as contractor, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of Westchester on the 10th day of June, 1916, upon the decision of the court after a trial at the Westchester Special Term, in an action to foreclose a mechanic's lien.

The liens grew out of the removal and remodeling of a dwelling house, including excavation of cellar, with installation of plumbing and heating fixtures, and the erection of a garage on Dearborn avenue in Rye, N. Y. Frank Klein was the general contractor. Four subcontractors, including the plaintiff Tibbits, also filed liens for their work and materials furnished. Although Klein's notice of lien claimed \$4,466.65, this embraced the amounts claimed by his subcontractors, which the court found aggregated \$1,454.17. In the judgment, however, Klein was decreed the sum of \$2,850, from which was taken the

App. Div.]

Second Department, June, 1917.

sums payable to the subcontractors, leaving as Klein's net recovery \$1,395.83. On this appeal the owner maintained that substantial performance had not been shown, so that Klein's recovery should be wholly reversed. On behalf of Klein it was urged that his gross recovery should have been \$3,995, with interest, instead of \$2,850.

Elwood J. Harlam [*William Baruch* with him on the brief], for the appellant Cohen.

Peter Klein, for the appellant Frank Klein.

PER CURIAM:

The record presents a situation where a building contractor undertook a job to conform to architect's plans and specifications, also to abide by the architect's decision in the event of any error or difficulty in the specifications. Within about a month the architect named was discharged, and the owner undertook to carry forward the enterprise, substituting himself as his own architect. We are satisfied that substantial justice has been done by the decree. In view of the disallowance in the decree of \$1,145 out of a total of \$9,482.80 (about twelve per cent), the owner urges that such a ratio of incomplete work should forbid a finding of substantial performance. However, on December 13, 1914, as the parties had met to hold a test of the heating plant, the contractor made a substantial offer towards the substitution of a larger boiler, with a further sum for other matters in issue. The owner stated he would take this proposition under consideration, and thereupon the work was suspended. Without any answer to that offer, the owner, however, on January 27, 1915, notified Mr. Klein that he considered the contract as abandoned, and that he would himself complete the same by employing other contractors. In that situation, we think the percentage idea has no application, and that the lienor was properly decreed what was equitably due him.

The judgment should be affirmed, but as both parties have appealed, the affirmance is without costs.

JENKS, P. J., STAPLETON, MILLS, PUTNAM and BLACKMAR, JJ., concurred.

Judgment affirmed, without costs.

WILLIAM GOODMAN, an Infant, by ROSE GOODMAN, His Guardian ad Litem, Appellant, v. BROOKLYN HEBREW ORPHAN ASYLUM, Respondent.

Second Department, June 23, 1917.

Negligence — liability of orphan asylum for negligence resulting in choice of incompetent, unskillful and careless servants — trial — failure of counsel in opening to refer to essential allegations of complaint — erroneous nonsuit.

The general principle protecting public institutions such as orphan asylums from liability in actions for negligence does not include their negligence resulting in the choice of incompetent, unskillful and careless servants. The fact that in an action against such an institution the counsel for the plaintiff in his opening omitted to refer to allegations that the defendant in disregard of its duties negligently, carelessly and recklessly hired and furnished to the plaintiff incompetent, unskillful and careless superintendents, agents, teachers, guides and employees and that plaintiff's injuries were sustained by reason of such negligence, recklessness and wrongful conduct of the defendant, does not warrant the dismissal of the complaint.

But, *it seems* that, if counsel had stated that he had abandoned said charge or had admitted that he could not establish it or if such change of attitude had been elicited by inquiry of the court or of his opponent or in consequence of the affirmative assumption of the latter, then the complaint might properly have been dismissed.

APPEAL by the plaintiff, William Goodman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 8th day of June, 1916, upon a dismissal of the complaint by direction of the court at the opening.

I. Gainsburg [*Herman C. Pollack* with him on the brief], for the appellant.

Meier Steinbrink, for the respondent.

JENKS, P. J.:

The general principle that protected such institutions as the defendant from actions for negligence, as declared in *Corbett v. St. Vincent's Industrial School* (177 N. Y. 16) and *Ackley v. Board of Education* (174 App. Div. 44), does not

include their negligence that results in the choice of incompetent, unskillful and careless servants. Thus in *McDonald v. Massachusetts General Hospital* (120 Mass. 432) the court apply the general principle, but say: "It might well be questioned whether any contract could be inferred between the plaintiff and defendant. It has offered to him freely those ministrations which, as the dispenser of a public charity, it has been able to provide for his comfort, and he has accepted them. It has no funds which can be charged with any judgment which he might recover, except those which are held subject to the trust of maintaining the hospital. If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work, by which injury has occurred, it has been held that they were not liable if proper care had been used by them in selecting those who were actually to perform the work. *Holliday v. St. Leonard's*, 11 C. B. (N. S.) 192. The liability of the defendant corporation can extend no further than this; if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, * * * it cannot be made responsible." *McDonald's* case is cited generally as an authority in *Corbett's Case* (*supra*). (See, too, *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620; *Joel v. Woman's Hospital*, 89 Hun, 73; *Corbett v. St. Vincent's Industrial School*, 79 App. Div. 343-348; *affd.*, 177 N. Y. 16; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13; *Farrigan v. Pevear*, 193 id. 147; *Plant System, etc., v. Dickerson*, 118 Ga. 647; 7 Labatt Mast. & Serv. [2d ed.] 7683-7686; S. & R. Neg. [2d ed.] § 331. See, too, the discussion in *Hordern v. Salvation Army*, 199 N. Y. 233.) It is not necessary to determine whether this limitation rests in the distinction between the doctrine of *respondent superior* and that of non-delegable duties or for other reasons. This limitation has not been accepted without some criticism and protest, prompted often by the consideration that a judgment on such liability none the less affects the defendant,

but if, for that consideration or for any other, the principle should be unlimited, it should be thus declared by the Court of Appeals alone.

The plaintiff pleaded, *inter alia*, that the defendant, in disregard of its duties, negligently, carelessly and recklessly hired and furnished to the plaintiff incompetent, unskillful and careless superintendents, agents, teachers, guides and employees, and *inter alia* that plaintiff's injuries were sustained by reason of such negligence, recklessness and wrongful conduct of the defendant. The counsel for the plaintiff, in opening his case, did not mention this feature of the complaint, and, when he closed, the defendant moved to dismiss the plaintiff on the opening. The court thereupon dismissed the plaintiff, and a judgment was entered in that the court "upon the pleadings and upon the opening statement of plaintiff's counsel to the jury, and upon motion of defendant's counsel," had ordered dismissal. But the opening of counsel was not the plaintiff's pleading. The plaintiff should not have been dismissed unless the counsel "in his opening address, by some admission or statement of facts, so completely ruined his case that the court was justified in granting a nonsuit." (*Hoffman House v. Foote*, 172 N. Y. 350. See, too, *Montgomery v. Boyd*, 78 App. Div. 64; *Eckes v. Stetler*, 98 id. 76.) All that counsel did that can be charged up against the plaintiff was to omit mention of that feature of his complaint that I have hitherto described. If counsel had stated that he had abandoned that charge, or had admitted that he could not establish it, or if such change of attitude had been elicited by inquiry of the court or of his opponent or in consequence of the affirmative assumption of the latter, then nonsuit might properly have followed. But I think that such was not the situation when the counsel closed his address and when the court took up the motion for dismissal. (Baylies Tr. Pr. [2d ed.] 247; *Wilson v. Press Publishing Co.*, 14 Misc. Rep. 514.) In *Brashear v. Rabenstein* (71 Kans. 455) the court well say: "The pleadings, and not the statements, make the issues, and no matter how deficient a statement may be from an artistic standpoint, or what its shortcomings may be in the estimation of the critical attorney on the other side, the court is not authorized to end the case because of

them unless some fact be clearly stated or some admission be clearly made which evidence relevant under the pleadings cannot cure, and which, therefore, necessarily and absolutely precludes recovery."

It follows that, despite the omission of counsel in his opening, the plaintiff should not have been dismissed but he should have been afforded opportunity to establish, if possible, the negligence of the defendant in the selection of servants to whose culpability the casualty could be attributed.

The judgment is reversed and a new trial is granted, costs to abide the event.

THOMAS, STAPLETON, MILLS and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

THOMAS KELLY, Respondent, v. CENTRAL RAILROAD OF
NEW JERSEY, Appellant.

Second Department, June 22, 1917.

Master and servant — negligence — validity of release from liability for personal injuries — want of consideration — when void as against public policy — when release executed by express company cannot be invoked by railroad company.

An agreement of release between an express company and its employee purporting to hold harmless the express company or any transportation company by whom or by whose servant said employee might be injured, void as against public policy for want of consideration, cannot be invoked by a railroad company in an action by said employee against it for the negligence of one of its servants in so handling a freight truck as to injure the employee.

APPEAL by the defendant, Central Railroad of New Jersey, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 3d day of May, 1916, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 31st day of May, 1916, denying defendant's motion for a new trial made upon the minutes.

John G. Milburn, Jr. [*Thomas S. Doughty* with him on the brief], for the appellant.

Henry M. Dater [*Jay S. Jones, Edward J. Fanning* and *L. Victor Fleckles* with him on the brief], for the respondent.

JENKS, P. J.:

The action is for negligence. The defendant, appellant, does not question the propriety or the amount of the verdict, but contends that the plaintiff should have been dismissed perforce of a release executed by him to his employer, the American Express Company, but available to the defendant. KELBY, J., who tried the case with a jury, properly directed that the issue of the release should be disposed of first. Thereupon, and when the defendant conceded that there was no consideration for the release save the said employment of the plaintiff, the court, under exception, held that the release was void as against public policy.

The duty of plaintiff as such employee required him as a porter to load, to unload cars at railway stations, and to use the platform of the defendant's station. While thus about his master's business he was run down and was injured by a freight truck, dragged by a servant of the defendant. The release purports to hold harmless the plaintiff's employer or any transportation company (of which concededly the defendant is one) by whom or by whose servant the plaintiff might be injured. We are of opinion that the ruling of the court was right, under the principle declared in *Johnston v. Fargo* (184 N. Y. 379). (See, too, *Fitzwater v. Warren*, 206 N. Y. 358.) If the release is void as against public policy, that vice exists when it is invoked by one who must assert that right through a party thereto and relies upon the consideration that moved from the latter. The learned and able counsel for the appellant lays stress upon *Baltimore & Ohio, etc., Railway v. Voigt* (176 U. S. 498). That case is considered but not followed in *Johnston's Case* (*supra*).

The judgment and order should be affirmed, with costs.

Present—JENKS, P. J., MILLS, RICH, PUTNAM and BLACKMAR, JJ.

Judgment and order unanimously affirmed, with costs.

In the Matter of the Application of THE CASTLE HEIGHTS WATER COMPANY, Respondent, to Acquire Additional Lands in the Town of Greenburgh, v. CHARLES R. PRICE and CORA W. PRICE, Appellants.

Second Department, June 22, 1917.

Condemnation proceedings — condemnation of land for water supply — damages — evidence — commissioners not bound by expert testimony.

Application by a water company to condemn unimproved farm land adjacent to other lands owned and worked by it. Evidence examined, and held, that the determination of the commissioners as to the amount of damages should be confirmed.

The value to the owner is not enhanced by the purpose for which the land is taken.

The commissioners are not necessarily bound to accept the figures of an expert witness. It is their duty to consider all of the proof and their conclusion, especially when reached after a view of the premises, should not be disturbed unless they appear to have done injustice by overlooking or disregarding proof before them, or by error in their theory of the award.

APPEAL by the defendants, Charles R. Price and another, from an order of the Supreme Court, made at the Orange Special Term and entered in the office of the clerk of the county of Westchester on the 18th day of June, 1915, confirming the report of commissioners of appraisal herein, with notice of an intention to bring up for review an interlocutory judgment entered in said clerk's office on the 3d day of June, 1914, determining that plaintiff is entitled to take defendants' property and appointing commissioners of appraisal.

Edwin L. Kalish, for the appellants.

John M. Digney, for the respondent.

JENKS, P. J.:

The plaintiff, a going water supply corporation, seeks to condemn the fee of a scant 8 acres of land in the town of Greenburgh and within a mile of the former village of White Plains.

The land is part of the defendants' farm. It is in a state of nature, unimproved, and about two-thirds of it is bogland. It is adjacent to other lands owned and worked by the plaintiff. The defendants' appeal is protest against the amount of damages. The general rule as to value is stated by SEWELL, J., for the court in *Matter of Simmons* [*Ashokan Reservoir, Sec. No. 7*] (130 App. Div. 359; *affd.*, 195 N. Y. 573; *affd.*, *sub nom. McGovern v. New York*, 229 U. S. 363). The value to the owner is not enhanced by the purpose for which it is taken. (*New York Central & H. R. R. Co. v. Mills*, 160 App. Div. 6.) The appellants contend that the commissioners proceeded upon an erroneous principle, in that they ignored the water capacity of the land. As it does not appear that the commissioners excluded any proof as to this feature, or disregarded it in their award, and the award is not itemized, this contention rests upon inference. And the inference is drawn from the fact that an expert witness, an eminent hydraulic engineer, is said to testify that the value is \$47,500, whereas the commissioners awarded \$10,000. But, even if he had so testified without contradiction or limitation, and was a credible witness, the commissioners were not bound to accept his figures, or those of any expert. (*New York Central & H. R. R. Co. v. Newbold*, 166 App. Div. 193; *Matter of Town of Guilford*, 85 *id.* 207, and cases cited.) But he did not so testify. His testimony on his direct examination is, "My estimate of the value of the water that that land would produce is \$47,500," and upon cross-examination, "Q. You say this land is worth \$47,500? A. I said the water was worth \$47,500." This estimate rests upon the hypothesis that by the use of water supply machinery there could be drawn from this tract 500,000 gallons a day for sale — at certain market rates. But the hypothesis did not assume that this scant 8 acres, isolated, could be made thus productive. For the witness testifies that he did not know the territory of supply, but that he did know that it included land outside of this tract. And he also testifies that upon the basis of general average the percolation of the tract itself would be but 750 gallons a day per acre. In this respect he is substantially in accord with another eminent hydraulic engineer, an expert for the plaintiff, who testifies that in that

district they estimated the taking of 500,000 gallons a day per square mile.

But the limit of the expert is not the limit of the law. The water company, perforce of its ownership of these 8 acres of wet bogland, could not apply its machinery so as to tap the water stored in that land, "and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return." (*Forbell v. City of New York*, 164 N. Y. 522, as approved in *People v. New York Carbonic Acid Gas Co.*, 196 id. 431.) And the fact that the water company, or any other person, might actually do this thing, in disregard of the rights of third persons, should not be taken in consideration. (*Kingsland v. Mayor, etc.*, 110 N. Y. 569.)

The only witnesses as to the value of the land were two, of whom both were called by the respondent, and whose estimates were \$5,000 and \$4,880 respectively. They did not consider the land as a source of water supply. As we have seen, the commissioners awarded double the higher sum. It is possible to infer that the excess represents their consideration of the feature of water capacity.

But in any event we cannot perceive that they erred in their theory of the award. It was their duty to consider all of the proof, but in the exercise of their own judgment. And their conclusion, especially when reached after view of the premises, should not be disturbed unless they appear to have done injustice by overlook or disregard of all of the proof before them, or to have erred in their theory of the award. (*New York Central & H. R. R. Co. v. Newbold*, *supra*, and cases cited.)

I advise affirmance, with costs.

THOMAS, STAPLETON, MILLS and RICH, JJ., concurred.

Final order affirmed, with costs.

In the Matter of the Application of SAMUEL J. MITCHELL, Appellant, for a Peremptory Writ of Mandamus Directing WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, Respondent, to Audit the Payroll for the Payment of the Salary of Said SAMUEL J. MITCHELL, as Under Sheriff and Acting Sheriff of the County of Queens, etc.

Second Department, June 23, 1917.

Public officers — vacancies — when term of sheriff chosen at special election commences to run — mandamus — term "on or about" defined.

The term of a sheriff chosen at a special election to fill a vacancy commences to run from the date of his election, notwithstanding the provision of section 180 of the County Law that there shall continue "To be elected in each of the counties a sheriff, * * * four coroners, * * * who shall respectively hold their offices for three years from and including the first day of January, succeeding their election."

Said provision of the County Law does not refer to an officer chosen to fill a vacancy, whether at a special or general election, but to the term of an officer chosen in regular course at a general election in November. It contemplates the beginning of the political year as prescribed by section 6 of article 10 of the Constitution.

The paramount aim of the Constitution and the statutes is to secure the filling of vacancies in elective offices by election at as early a day as is practicable.

Hence, where an under sheriff was chosen sheriff at a special election on January twenty-third, received his certificate on or about January thirtieth, and on February sixth swore to his oath of office, which was filed on February seventh, the day after his undertaking was officially received, and, in an application for a peremptory writ of mandamus to compel the audit of the payroll for his salary as under sheriff and acting sheriff, alleged in his affidavit that "on or about the fifth day of February, 1917, your petitioner, as acting sheriff of said county of Queens, duly certified the payroll," an order denying said writ should be affirmed as his affidavit is not sufficient to establish that he certified the payroll on February fifth so as to exclude February sixth, when he took the official oath and his bond was received, or February seventh, when the oath was filed.

The term "on or about" is with regard to time a relative term sufficiently definite in certain connections but rendering the statement which it modifies insufficient for purposes to which definite accuracy is requisite.

App. Div.]

Second Department, June, 1917.

APPEAL by Samuel J. Mitchell from an order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 29th day of March, 1917.

Philip Frank, for the appellant.

William E. C. Mayer [*Lamar Hardy*, Corporation Counsel, *Terence Farley* and *Edward S. Malone* with him on the brief], for the respondent.

JENKS, P. J.:

This appeal is from an order of the Special Term that denies a peremptory writ of mandamus. When Sheriff Stier, of Queens county, died on October 23, 1916, the relator was the under sheriff. Thereupon section 181 of the County Law (Consol. Laws, chap. 11; Laws of 1909, chap. 16) charged him in all things to execute the duties of the office as sheriff, and he undertook to do so. But his status continued only until the vacancy was supplied by election or appointment. (*People v. Snedeker*, 14 N. Y. 52, 59.) No appointment was made to fill the vacancy, but by proclamation of the Governor a special election was held on January 23, 1917, to fill it, and on that day the relator was elected sheriff. The return of the election to the Secretary of State was dated January 30, 1917, and the certificate of election, dated on that day, was issued to the relator. The relator took his oath of office on February 6, 1917, and filed it on February 7, 1917. His official bond, dated January 23, 1917, was filed on February 6, 1917. "On or about" February 5, 1917, the relator certified the payroll for the salaries of himself and the employees of his office for the first half of that month as acting sheriff of said county of Queens; but the payroll was rejected by the comptroller of New York city upon the ground that it should be certified by the relator as sheriff of the county of Queens. The argument of the relator is not confined to the precise day when he was clothed with the office of sheriff, but involves the contention that his term as sheriff does not begin until the 1st day of January, 1918.

The contention rests principally, if not altogether, upon

section 180 of the County Law, which I shall presently consider. The policy of the State with respect to vacancies in elective offices is to fill them by election at as early a period as practicable. (*People ex rel. Weller v. Townsend*, 102 N. Y. 439.) To this end the Constitution provides, not only that sheriffs shall be elected once in three years, but as often as vacancies shall happen (Art. 10, § 1). And section 5 of the same article prescribes that the Legislature shall provide for filling vacancies in office. This policy is further made manifest by the provision of the same section that no person appointed to fill a vacancy in an elective office shall hold office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy. Accordingly, the Legislature has provided for the filling of such vacancies at general elections and by special elections. (Election Law [Consol. Laws, chap. 17; Laws of 1909, chap. 22], § 292, as amd. by Laws of 1911, chap. 891.) This provision has received interpretation in *Matter of Mitchell v. Boyle* (219 N. Y. 242). Neither Constitution nor statute, by direct, affirmative, specific provision, has prescribed when the term of a sheriff elected at a special election to fill a vacancy shall begin. In the absence of such provision, I am of opinion that the term of the relator commenced to run from the date of his election. (*Attorney-General ex rel. Haight v. Love*, 39 N. J. L. 476; *State of Ohio v. Constable*, 7 Ohio, 7; *Macoy v. Curtis*, 14 S. C. 367; *Prowell v. State ex rel. Hasty*, 142 Ala. 80; *State ex rel. Sawyer v. Pollner*, 18 Ohio Cir. Ct. 304.) If the term of such an office did not begin until the 1st of January, 1918, then there would be no reason for providing for special elections, inasmuch as a general election would afford an incumbent elected by the people. The very fact that the Legislature has provided for a special election, a proclamation for which is mandatory (*Matter of Mitchell v. Boyle*, *supra*), indicates the contrary view. Although this precise point was not involved in *Matter of Mitchell v. Boyle* (*supra*), the discussion of that case (p. 249) plainly indicates that the court considered that the result of the special election would result in the early filling of the vacancy by election, by one whose term would thereupon begin. The remarks of BRONSON, J., in *People v. Fisher*

App. Div.]

Second Department, June, 1917.

(24 Wend. 215) are significant of his opinion as to the effect of an election similar to that now under consideration: "This space in which the office may not be filled by election can never exceed one year, and may sometimes amount only to a few days." Pursuant to the prescribed procedure, at the time in question a sheriff had been elected, had qualified and practically had entered upon office, for obviously he was discharging the duties of the office as far as possible. Despite his contention that he was *locum tenens*, it is not suggested that he could as sheriff practically do anything additional in such discharge. The comment of the court in *People v. Keeler* (17 N. Y. 370, 374) is pertinent: "It would be preposterous to say that the office was vacant when there was a person at hand who had been chosen by election in the manner required by the Constitution, whose term of service had commenced, and who stood ready to serve."

The relator relies, as I have said, upon an express provision of the statute, in that the said section 180 of the County Law (as amd. by Laws of 1916, chap. 87) reads that there shall continue "To be elected in each of the counties a sheriff, * * * four coroners, * * * who shall respectively hold their offices for three years from and including the first day of January succeeding their election." This provision refers, I think, not to an officer chosen to fill a vacancy, whether at a special or general election, but to the term of an officer chosen in regular course at a general election in November. It contemplates the beginning of the political year, as prescribed by section 6 of article 10 of the Constitution. It seems to me that such is the case appears from the provisions of section 4 of the Public Officers Law (Consol. Laws, chap. 47; Laws of 1909, chap. 51), which is the more organic statute. This provides: "The term of office of an elective officer, *unless elected to fill a vacancy then existing*, shall commence on the first day of January next after his election." And this specific exception shows obviously that the term of this officer does not commence on the 1st day of January, 1918. The paramount aim in construction of these provisions is to secure the filling of vacancies in elective offices by election at as early a day as is practicable, and my construction is in harmony with the principles so admirably stated by

FOLGER, J., for the court in *People ex rel. Jackson v. Potter* (47 N. Y. 375, 379).

So far as the precise question in this case is concerned, the relator, as I have said, was elected on January 23, 1917, received his certificate on or about January 30, 1917, and on February 6, 1917, swore to his oath of office, which was filed on February 7, 1917. His undertaking was received officially on the day prior thereto. The payroll was certified, according to the relator, "on or about the 5th day of February, 1917." This, in any event, might be regarded as a statement that the payroll was certified in the month of February, and so after the election, the issue of the certificate thereof, and obviously while the relator was discharging the duties of a sheriff. Even conceding that he certified the payroll on February 5th, I think that he must be regarded as the sheriff on that day. (*Macoy v. Curtis, supra*, 375 *et seq.*; *State ex rel. Sawyer v. Pollner*, 18 Ohio Cir. Ct. 304, 310 *et seq.* See, too, *Horton v. Parsons*, 37 Hun, 45; *People ex rel. Woods v. Crissey*, 91 N. Y. 636; *Foot v. Stiles*, 57 *id.* 399; Pub. Off. Law, § 15.) And further, the relator moves for a peremptory writ of mandamus in that he had acted within the law. That act purported to be an official doing in writing. It is hard to credit that he did not know, or at least could not inform himself of the exact date thereof. And yet he deposes that "on or about the 5th day of February, 1917, your petitioner, as Acting Sheriff of said County of Queens, duly certified the payroll." Even if there were any force in relator's contention that he was not the sheriff on February 5th because he had not then taken his oath of office or had not then filed his undertaking, I think that his affidavit is not sufficient to establish that he certified the payroll on February 5th so as to exclude February 6th, when he took the official oath and his bond was received, or February 7th, when the oath was filed. "On or about" is "With regard to time, a relative term, sufficiently definite in certain connections, but rendering the statement which it modifies insufficient for purposes to which definite accuracy is requisite." (29 Cyc. 1492.) In *Paine v. Com. State Land Office* (66 Mich. 245, 248), the court, per CAMPBELL, C. J., say: "But 'on or about' March 8 is just as consistent with a day or two after as before." (See, too, *Conroy*

App. Div.]

Second Department, June, 1917.

v. *Oregon Construction Co.*, 23 Fed. Rep. 71, 73.) Concededly, every formality had been complied with by the end of February, 1917.

I advise affirmance, with ten dollars costs and disbursements.

THOMAS, STAPLETON, MILLS and RICH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

RAYMOND N. LOCKWOOD, Appellant, v. THE BEDELL COMPANY, Respondent.

Second Department, June 22, 1917.

Discovery of books and papers of corporation — when proper in action to recover percentage of profits due for services.

An employee of a corporation who brings an action at law to recover a certain percentage of its net earnings as compensation is entitled to a discovery and inspection of its books containing its business transactions within the period embraced within the cause of action, which tend to establish its net profits for said period.

The fact that the plaintiff demanded judgment for such sum in excess of a certain amount which an accounting may determine him entitled to, does not change the action from one at law to one in equity. Nor does the fact that the contract was denied deprive the plaintiff of his right to a discovery.

APPEAL by the plaintiff, Raymond N. Lockwood, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 29th day of December, 1916.

George E. Brower [*George V. Brower* with him on the brief], for the appellant.

Charles E. Travis, for the respondent.

RICH, J.:

This appeal is from an order of the Special Term denying plaintiff's application for discovery and inspection of certain books of the defendant corporation, in an action brought to

recover compensation for his services. He claims to be entitled to a sum equal to not less than seven and one-half per cent of the net earnings of the corporation for the year ending March 1, 1913, which he alleges upon information and belief to have been in excess of \$115,000. The percentage to which he claims to be entitled amounts to at least \$8,525, of which he has received \$5,800, leaving due and owing a balance in excess of \$2,725. The question presented depends upon the determination as to whether the action is one in equity.

I think that the conclusion of the learned Special Term in denying the plaintiff's motion upon the authority of *Conrady v. Buhre* (148 App. Div. 776) is erroneous in that it applies a rule applicable only in equity cases, while the facts alleged in the case at bar present an action at law, to which such rule laid down in the *Conrady* case has no application. (*Smith v. Bodine*, 74 N. Y. 30; *Lee v. Washburn*, 80 App. Div. 410; *Lindner v. Starin*, 128 id. 664; *Gee v. Pendas*, 66 id. 566; *Chaurant v. Maillard*, 56 id. 11.) Although the complaint demands equitable relief, an answer having been interposed, such demand must be regarded as surplusage (*Gillespie v. Montgomery*, 93 App. Div. 403), and whether the action is legal or equitable is to be determined by the allegations of the complaint and the relief to which the plaintiff is entitled. The only difference I am able to discover between the case at bar and the case of *Thomas v. Waite Co.* (113 App. Div. 494) is that in that case the complaint demanded judgment for a specified sum of money, while in the case at bar the relief demanded is a judgment for such sum in excess of \$2,725 as an accounting may determine the plaintiff entitled to, a difference which does not change the action under consideration from one at law to one in equity or remove it from the operation of the rule declared in the *Thomas* case. The respondent's contention, that even if the action be held to be one at law the order must be affirmed because the contract is denied, is without merit. The contract upon which the action was based was denied in the *Thomas* case, but, being an action at law, it was held that that fact did not change the disposition to be made or warrant the application of the equitable rule. Furthermore, the action being at law and

App. Div.]

Second Department, June, 1917.

triable by jury, it is not practicable that the plaintiff should first establish his alleged contract and enter an interlocutory judgment for an accounting, as all of the issues must be disposed of on one trial. (*Boisnot v. Wilson*, 95 App. Div. 489.) The period of time during which plaintiff's cause of action is alleged to have accrued is between March 1, 1912, and March 1, 1913, and I think he is entitled to an inspection and discovery of such of defendant's books as embrace that period of time, but no other. The books, however, are specified in the petition in twelve subdivisions, most of which contain defendant's business transactions during the year 1910 and other years not included in the allegations of the complaint, and clearly the transactions of the defendant during those periods are of no concern to plaintiff and he is not entitled to an inspection for any time before March 1, 1912, or after March 1, 1913. Under the tenth subdivision, the books it is desired to inspect are stated as "Money Order Div. and Phila. Store Book for 1913," referring to a Philadelphia store and business which the respondent in its brief states is not, and has no relation to, its business, but is the business of and solely owned and conducted by the Bedell Company of Philadelphia, an entirely different and independent corporation. I find no proof of this statement in the papers, but, if true, the plaintiff is not entitled to an inspection and discovery of those books, his right in that respect, as I have said, being limited to the books of the defendant containing its business transactions between March 1, 1912, and March 1, 1913, which tend to establish its net profits for that period of time.

The order, therefore, is reversed, with ten dollars costs and disbursements, and the proceeding remitted to the Special Term for such further proceeding as plaintiff may be advised to take.

JENKS, P. J., THOMAS, STAPLETON and MILLS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and proceeding remitted to the Special Term for such further proceeding as plaintiff may be advised to take.

BENJAMIN F. WOODY, Plaintiff, v. WILLIAM W. BRUSH and Others, Defendants.

Second Department, June 22, 1917.

Municipal corporations — master and servant — liability of municipal employees for procuring discharge of subordinate by false and malicious reports to superior — privileged communications between employee and superior — malice — pleading — complaint.

A supervising employee, acting in good faith, may truthfully report to his superior the acts, delinquencies, disqualifications and inefficiency of subordinate employees over whom he is charged with the duty of supervision, and thereby procure their discharge, without liability to the discharged employee, even though his act in so doing was promoted by ill-will, enmity or the desire to secure such discharge, for the reason that in so doing he is exercising a legal right and performing his legal duty. But a superior employee has no right to falsely, without regard to the truth and actuated only by enmity and malice, make an unjustified and malicious report to a superior officer, for the purpose of accomplishing the removal of an honest, faithful and competent employee, who stands in the way of "graft," and he is liable for the damages occasioned by his malicious, false and unjustified act.

The privilege of making known to a superior the incompetence of a subordinate does not extend or protect beyond such statements as are made in the performance of duty, believing them to be true, and for words not material and spoken falsely and maliciously an action will lie.

The presence of malice in reporting to the common master or employer is immaterial providing the reporting employee keeps within his qualified legal privilege in exerting his influence.

Complaint in an action by an inspector in the department of water supply, gas and electricity of the city of New York against other employees of said department based solely upon intentional wrongful and malicious acts of the defendants, resulting in damages to the plaintiff, depriving him of his lawful employment and injuring his name and character and reputation, examined and *held*, to state a cause of action.

No rule of public policy prevents the maintenance of such an action nor does it interfere in any manner with the right of a superior employee to truthfully report to his superior or the common employer the acts of inefficiency of a coemployee, even though in so doing he is actuated by ill-will or a desire to procure the discharge of such subordinate.

MOTION by the plaintiff, Benjamin F. Woody, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal

App. Div.]

Second Department, June, 1917.

of the complaint at the opening of a trial before a court and jury at the Kings County Trial Term in February, 1917.

When this action was brought on for trial the defendants moved to dismiss the complaint upon the ground that it did not set forth a cause of action; the motion was granted and an exception taken which was ordered to be heard by the Appellate Division in the first instance, entry of judgment being stayed.

The complaint alleges that the plaintiff was in the employ of the city of New York, filling the position of an inspector in the department of water supply, gas and electricity, with a salary of \$1,800 per annum; that all of the defendants were employed in that department; Brush as deputy chief engineer; Gannon as mechanical engineer having charge of all the inspectors employed in the department, and Colligan as supervising or chief inspector; that in the regular course of his employment plaintiff was assigned to the duty of inspecting the plants and manufactured product of various concerns doing business with said city of New York, under contracts to furnish said department of water supply, gas and electricity with the material and supplies specified in and by such contracts, and required therein to conform to and comply with specifications prepared by or under the direction of the defendant Brush; that among the plants and products to the inspection of which the plaintiff was so assigned was that of the Kennedy Valve Company, which had a contract with said city for valves to be used in connection with its high water pressure; that in March, 1910, the commissioner of said department, who was its head, approved of an organization therein of an engineering bureau — including a minor bureau to have charge of the inspection of contracted-for material before delivery, and of inspectors at foundries, machine shops and other points of manufacture — and such organization was thereupon effected, the defendant Gannon given the supervision and direction of such bureau and the plaintiff directed to thereafter report to him; that thereafter the defendant Colligan was charged with and given the immediate supervision and superintendence of all work directly connected with the inspection of foundries connected with and forming part of the plants of contractors; that one Peck,

another employee of the city, was inspector at the plant of the Kennedy Valve Company in November, 1910, and rejected some of its products as not complying with the specifications and requirements of its contract; that after such rejection the products so rejected were doctored and altered for the purpose of deceiving inspectors thereafter examining them into passing the same as perfect although in fact defective, unfit for use, and not in accordance with contract specifications, which fact, with other deceptive and misleading methods and test bars employed by said company for the purpose of showing greater strength than was actually possessed by their manufactured products, were reported by Peck and the plaintiff to the defendant Colligan; that after the inspection and rejection of a number of valves manufactured by said company, the defendant Colligan called at the plant of said company and witnessed tests made of said valves, and was informed of the fraudulent and wrongful efforts of said company to doctor and cover up the defective parts of said valves exhibited to him; that shortly thereafter said Colligan requested both Peck and the plaintiff, as a personal favor to him, to reconsider and pass such rejected work, saying to them that it would be covered and not observable in the ground where it was to be used, and that "if you want to stay in the Department, you have got to have the engineers with you," but both Peck and the plaintiff refused to pass such work or valves; that thereafter Colligan requested plaintiff to deny the report made by said Peck to the commissioner of said defective work, stating that if plaintiff did so the engineers would protect him, and that if he did not stick to the engineers he could expect nothing from them, but plaintiff refused so to do; that thereafter plaintiff procured sample test bars used in connection with the valves manufactured by said company, together with sworn statements as to the manner of casting the same and of the giving of false values to the castings, which he placed before the chief engineer and the defendants Brush and Gannon. These allegations are followed by the averments:

"*Seventeenth.* Upon information and belief, that thereafter the defendants, Brush, Gannon and Colligan, wilfully and maliciously and without just cause or provocation, and by false reports and statements among others concerning this

App. Div.]

Second Department, June, 1917.

plaintiff in connection with the work at said Kennedy Valve Company, and also with that done at the Luman Bearing Foundry, and particularly with the said test bars and plaintiff's statements in regard to the same made to the Commissioner of Water Supply, Gas & Electricity, brought about, caused and procured plaintiff's discharge from his said position of Inspector in said Department, said discharge being made on or about the 2nd day of July, 1913.

"*Eighteenth.* That thereafter, and after plaintiff had made application for reinstatement, to his said position, and while the said application was under consideration by the Commissioner of said Department, the defendant, Brush, wilfully and maliciously and intending thereby to prevent plaintiff's reinstatement, did, by false statements made by him concerning the plaintiff induce and procure the said Commissioner to reject plaintiff's application for reinstatement.

"*Nineteenth.* Upon information and belief, that plaintiff's discharge from his said position was wilfully and maliciously caused, procured and brought about by the defendants and each of them, through false and misleading statements and insinuations made against him, to the Commissioner of Water Supply, Gas & Electricity, and the Chief Engineer of the said Department, by the defendants and each of them; said defendants and each of them well knowing that the statements, and insinuations so made by them against this plaintiff, were false and malicious and were being made by them for the purpose of causing, procuring and bringing about plaintiff's discharge from his said position and from said Department.

"*Twentieth.* That by reason of the wilful and malicious acts of the defendants and each of them, in the premises, plaintiff lost his position as an Inspector in said department and the salary thereto attached, and has been greatly injured in his good name, credit and reputation, all to his damage in the sum of ten thousand (\$10,000) dollars."

Ralph G. Barclay [*Robert Stewart* with him on the brief], for the plaintiff.

Edward A. Freshman [*Lamar Hardy, Corporation Counsel*, and *Thomas F. Magner* with him on the brief], for the defendants.

RICH, J.:

The contention of the defendants is that an action will not lie for a removal caused by false and malicious reports, made by a superior employee to the head of a department or common employer concerning the supervised employee, the argument being that it was the duty of the defendants to supervise the plaintiff and report to their superior, the commissioner, the faults, misconduct or inefficiency of the plaintiff, because of which the rule declared by this court in *Warschauser v. Brooklyn Furniture Co.* (159 App. Div. 81), and in the authorities cited, has no application. As they put it, "The broad rule of public policy forbids the penalization of free criticism of public officers. Although actions may lie for defamation, even by public officers, if privilege is exceeded, the courts will not go further and seek to punish those who have secured removals, even maliciously and by false statements. The danger to our institutions would be too great if such actions were permitted. All the more abhorrent it would be to public policy if those specifically charged with the duty of reporting delinquencies had their mouths closed by the prospect of such actions."

It is true, of course, that a supervising employee, acting in good faith, may truthfully report to his superior the acts, delinquencies, disqualifications and inefficiency of subordinate employees over whom he is charged with the duty of supervision, and thereby procure their discharge, without liability to the discharged employee, even though his act in so doing was prompted by ill-will, enmity or the desire to secure such discharge, for the reason that in so doing he is exercising a legal right and performing his legal duty; but no right is possessed by a superior employee to falsely, without regard to the truth, and actuated only by enmity and malice, make an unjustified and malicious report to a superior officer, for the purpose of accomplishing the removal of an honest, faithful and competent employee, who stands in the way of graft, nor can he do so without incurring liability for the damages occasioned by his malicious, false and unjustified act.

No case is called to our attention by the defendants, and I am aware of none, which sustains directly or inferentially such an abhorrent principle. In this connection we are

referred to *Lancaster v. Hamburger* (70 Ohio St. 156; 65 L. R. A. 856), in which it was held that a patron of a street railway company incurred no liability to a conductor by reporting to the superintendent of the company the conductor's misconduct toward a passenger, although in making the report he was prompted by ill-will and a desire to secure the conductor's discharge, the ground upon which such decision was based being that in so doing such patron was exercising his legal right, if not, indeed, performing his duty. This case does not sustain the defendants' contention, because the report was true, which is not the case presented by the complaint in the action at bar.

The defendants rely upon the proposition that their communications to the commissioner, alleged in the complaint and relied upon by the plaintiff as establishing his cause of action, were privileged communications because of their duty and privilege to make known to their superior the incompetency of their subordinate. This privilege is qualified, that is, it does not extend or protect beyond such statements as are made in the performance of their duty, believing them to be true (*Bingham v. Gaynor*, 203 N. Y. 27, 31), and for words not material and spoken falsely and maliciously an action will lie. (*Lathrop v. Hyde*, 25 Wend. 448.) The presence of malice in reporting to the common master or employer is immaterial, provided the reporting employee keeps within his qualified legal privilege in exerting his influence. In the case at bar the presence of the reasonable and justified performance of a duty is inconsistent with the fraud, malice and purpose of injury alleged to have actuated the defendants, and it is upon the allegations of the complaint which exclude any underlying duty or justifiable motive or privilege of the defendants in their performance of the acts complained of, that the plaintiff's right of action rests. The case presented is within the principle sustained by this court in *Warschauser v. Brooklyn Furniture Co.* (*supra*), in which, after stating the general rule applicable to this class of cases to be as declared in *Walker v. Cronin* (107 Mass. 555, 562), that " ' In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.' The intentional causing of such

loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong," in adopting the rule declared in *Chipley v. Atkinson* (23 Fla. 206), Mr. Justice STAPLETON says: "In the well-considered case of *Chipley v. Atkinson* (23 Fla. 206) it was held that an action lies in behalf of an employee against a person who has maliciously procured the employer to discharge such employee from employment, where the period for which the employment was to continue is not certain, if damage result from the discharge, even though, from inability to ascertain the amount of the damage, a verdict for nominal damages only should result. In that case the court said: 'From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such an agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person who is in employment by which he is earning a living or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance.' " This rule applies to employees of a municipal corporation, as well as the employees of a corporation or individual, and disinterested third persons who, for the sole purpose of injuring a subordinate employee, willfully and maliciously make false statements or reports, knowing them to be false, to his superior employee having the right and power to employ and discharge, or the common employer, resulting in actual damage to the subordinate employee,

without fault, neglect or dereliction of duty on his part and caused solely by, and resulting from such wrongful and malicious acts and false statements and reports of the supervising employee. The complaint alleges a cause of action against municipal employees — not officers — of this character, based solely upon intentional, wrongful and malicious acts of the defendants, calculated, intended to and resulting in damages to the plaintiff, depriving him of his lawful employment and injuring his good name, character and reputation, which were done and made by the defendants with the unlawful, sole and wholly unjustifiable purpose and intention of injuring and damaging him. No rule of public policy prevents maintaining such an action, nor does it interfere in any manner with the right of a superior employee to truthfully report to his superior or the common employer, the acts, conduct, habits, disqualification or inefficiency of a co-employee, personally known by him to exist, or, if based on hearsay, believed by him to be true, even though in so doing he is actuated by ill-will, enmity or desire to procure the discharge of such subordinate employee.

A cause of action is alleged and the exception to the dismissal of the complaint is sustained, costs to abide the event, and the action remitted to the Trial Term for trial upon the merits.

JENKS, P. J., STAPLETON, PUTNAM and BLACKMAR, JJ., concurred.

Exception to dismissal of the complaint sustained, costs to abide the event, and action remitted to the Trial Term for trial upon the merits.

ANTHONY LORENZO, as Administrator, etc., of MARY LORENZO, Deceased, Appellant, v. MANHATTAN STEAM BAKERY, INC., and HERMAN HUEG, Respondents.

Second Department, June 23, 1917.

Street railroads — motor vehicles — passenger alighting and passing behind car struck and killed by automobile truck — municipal ordinance — contributory negligence — ownership of truck — questions for jury.

In an action for death caused by an automobile truck it appeared that the deceased, after alighting from a street car, passed behind the same and when a foot from the car track looked through the rear fender, which somewhat obstructed her view, and could see no vehicle at a distance of eighty feet; that the truck without stopping and without warning struck and killed the deceased while she was within eight feet of the street car, and that an automobile ordinance prevented such a vehicle from passing or approaching within eight feet of the street car so long as the same remained standing for the purpose of discharging or taking on passengers.

Held, on all the evidence, that an issue of contributory negligence was presented for the jury, and that it was error to set aside a verdict for the plaintiff.

As the automobile truck bore the name of one of the defendants and was its property, being at the time loaded with its goods, it could not insist as a matter of law that the formal lease of the same to another and other contracts relieved it from liability.

APPEAL by the plaintiff, Anthony Lorenzo, as administrator, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 19th day of March, 1917, dismissing the complaint by direction of the court after a trial before the court and a jury, and also from an order entered in said clerk's office on the 14th day of March, 1917, setting aside the verdict of the jury in plaintiff's favor for \$1,500, dismissing the complaint and denying plaintiff's motion to set aside the verdict on the ground of insufficient damages.

About seven A. M. of March 30, 1915, Mary Lorenzo, a girl of seventeen, while on her way to work, was struck by an automobile truck coming up Jackson avenue towards the Bridge plaza. In company with a girl companion, deceased

App. Div.]

Second Department, June, 1917.

had come in from Corona, L. I. From the Bridge plaza they took a street car, which they left at Jackson and Nott avenues, Long Island City. The front end of the car stopped "a little bit back" of the corner. Her place of employment was on Thomson avenue.

Irene Klein, who was with decedent, testified that they got off the car immediately behind several other girls. Decedent alighted first, followed by Miss Klein. They walked behind the back of the car. When one foot away from the back of the car, "we looked up the street * * * towards the ferry," could not see very clearly on account of the fender of the car being tied to the dashboard at the rear of the car. Could see, however, up to the corner — a distance of eighty feet. Saw no vehicle. They continued gazing in same direction. When they came to the second car track they looked forward to see where they were going. When in about the center of that track the automobile struck them which came from the direction of the ferry. The witness heard no horn or signal. The testimony is conflicting whether at this time the street car had started on. The motorman, McCaffrey, said he had "started up slightly." Conductor Smith said just at hearing the commotion they were "about clear, to start," or "might have started." Goldberg, who drove the auto, said the car was "pulling out." He inferred this from hearing the starting bell "as I passed it."

The Special Ordinance of August 14, 1914, and the Code of Ordinances of the City of New York, approved March 30, 1915, being chapter 24, Traffic Regulations, article 2, Rules of the Road, section 17, were introduced in evidence. (See 17 Ord. Res., etc., Bd. Ald., etc. [1914] 298, 299, No. 460; Cosby's Code Ord. [Anno. 1915] pp. 337, 338. Now Cosby's Code Ord. [Anno. 1917] p. 517.)

The learned court set aside the verdict for plaintiff on two grounds; that deceased was shown to have been guilty of contributory negligence, and that the driver of the automobile was not shown to have been in the service of the defendants.

Edward E. Hoenig [William M. Sullivan with him on the brief], for the appellant.

Mark Nave, for the respondents.

PUTNAM, J.:

The testimony of Irene Klein, who followed deceased out of the street car, described how, with other alighting passengers, they passed behind the car and, when a foot from the car track, looked westerly towards the ferry, but though the rear fender, as tied up, interfered somewhat with their view, they could still see to the corner, a distance of eighty feet, when they saw no vehicle. Whether the street car was still stopped discharging passengers as the auto truck came up is left in some doubt. The terms of the automobile ordinance forbidding a vehicle overtaking or meeting a street car which has stopped to receive or discharge a passenger or passengers, to "pass or approach within eight (8) feet of said car so long as the same is so stopped and remains standing for the purpose aforesaid," bear on the care that persons like deceased were called on to use. The fact that the auto truck came on without stopping, and, with no warning horn or signal, struck and killed deceased, then on the middle of the east-bound track, presented an issue of contributory negligence for the jury.

It is, however, urged that plaintiff failed to prove that the driver of the automobile truck was engaged in the service of either defendant. Inasmuch as this automobile truck bore the name of the Manhattan Steam Bakery, Inc., and was its property, being at the time laden with its goods, that defendant could not insist as a matter of law that the formal leases for a week to August Hueg, and other contracts, relieved such defendant from liability. That, too, became a question for a jury. (*Baldwin v. Abraham*, 57 App. Div. 67, 73; 171 N. Y. 677.)

The order setting aside the verdict and the judgment for defendants are, therefore, reversed, and a new trial granted, costs to abide the event.

JENKS, P. J., STAPLETON, RICH and BLACKMAR, JJ., concurred.

Order setting aside verdict and judgment for defendants reversed, and new trial granted, costs to abide the event.

App. Div.]

Second Department, June, 1917.

In the Matter of the Appraisal of the Estate of JOHN P. MOEBUS, Deceased, under the Acts in Relation to the Taxable Transfers of Property.

HELENA CAROLINE WILSON and JOHN HENRY MOEBUS, as Executors, etc., of JOHN P. MOEBUS, Deceased, and HELENA CAROLINE MOEBUS, Individually, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Second Department, June 22, 1917.

Tax — transfer tax — money and mortgages held jointly by husband and wife — estates by entirety — constitutional law — Tax Law, section 220, subdivision 7, taxing vested estates by the entirety.

Where moneys on deposit and mortgages are held in the joint names of husband and wife only the half interest should be taxed under section 220 of the Tax Law upon the death of the husband.

Subdivision 7, section 220 of the Tax Law, as amended, authorizing the taxation of estates by the entirety which at the enactment of said statute had already vested, is constitutional.

A surviving tenant by the entirety in this State acquires an interest taxable under said provision of the Tax Law, at one-half the value of the lands. The same rule holds as to lands subject to a contract of sale, and also as to personal property held jointly.

APPEAL by Helena Caroline Wilson, individually and as executrix, and another, from an order of the Surrogate's Court of the county of Westchester, entered in the office of said Surrogate's Court on the 20th day of April, 1917, confirming a previous order fixing the transfer tax herein.

Mr. John P. Moebus died July 23, 1916, leaving personal property held jointly with his wife — a checking account in both names in the Mount Vernon Trust Company, and eight mortgages running to both the husband and wife. They also held land at Mount Vernon, as tenants by the entirety, valued at \$10,300. Other land at Yonkers had been thus held, but when Mr. Moebus died there was outstanding a written contract of May second, which covenanted to give the purchaser a conveyance of same on or before May 1, 1917, at a net price of \$5,300.

Section 220, subdivision 7, of the Tax Law (Consol. Laws,

chap. 60 [Laws of 1909, chap. 62], added by Laws of 1915, chap. 664), as amended by Laws of 1916, chapter 323, which took effect April 26, 1916, is as follows:

"Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will."

The appraiser treated all the following joint items, both realty and personalty, as taxable at their full amounts:

Mortgages.....	\$46,428 44
Cash in Mount Vernon Trust Co.....	2,783 45
Land as tenants by the entirety.....	10,300 00
Total.....	<u>\$59,511 89</u>

All the above had vested in the husband and wife before April 26, 1916, the date of this statute. The Surrogate's Court confirmed a valuation of the whole estate, after proper deductions, at \$77,403.66, upon which was computed a tax of \$1,198.07. Besides questioning the interpretation of this provision of the Tax Law, appellants contest the constitutional power to tax estates by the entirety which at the enactment of such statute had already vested.

Arthur M. Johnson, for the appellants.

Francis A. Winslow [*G. Henry Mahlstedt* with him on the brief], for the respondent.

App. Div.]

Second Department, June, 1917.

PUTNAM, J.:

As to the moneys and mortgages held in the joint names only, the half interest should be taxed instead of the full amount, as now appraised. (*Matter of McKelway*, 221 N. Y. 15.)

As to land held by the entirety, we must refer the State's power to tax to "the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." (*Knowlton v. Moore*, 178 U. S. 41, 56.) Where such a tax is laid on all which passes by the "laws regulating intestate succession," an estate by the entirety passed to the survivor free of such tax, since the survivor's title is not acquired by intestate succession, but by reason of the nature of the estate. (*Palmer v. Treasurer & Receiver General*, 222 Mass. 263, 265.)

The New York act of 1916 was carefully drawn so as to cover such estates by name and by statement of their characteristics. The Legislature has thus expressed its intent by unmistakable words. I cannot follow the argument that such legislation would impose a retroactive tax, since it is the death from which the succession (if there be a legal succession) is derived. The statute applies to estates *in presenti*, and I see no difficulty in upholding such a taxing power. For illustration, the joint deposit in *Matter of McKelway* (*supra*) had been made in November, 1913, two years before the statute imposing the tax.

The Legislature did not ignore the joint interest, by attempting, on the death of one, to tax both halves of the joint fund or estate. For taxation purposes, the survivor's right to immediate ownership realizable by death of the other owner, is to be deemed a taxable transfer "in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased," who had bequeathed it to the survivor. The act relates this devolution of interest wholly to the death, so as to cut off any contention that such survivorship was but an incident of the original creation of such joint estates. This was within the law-making power, since it only reaches and taxes the *jus accrescendi* arising from death.

Hence we are brought to the final inquiry, Does the surviving tenant by the entirety in the State of New York acquire an interest that is taxable? Speaking of such estates with their original incidents, unaffected by the later statutes, it has been accurately said of such tenants: "Death separated them, and the survivor still held the whole because he or she had always been seized of the whole, and the person who died had no estate which was descendible or devisable." (*Stelz v. Shreck*, 128 N. Y. 263.)

Notwithstanding this original peculiarity of title, the use and enjoyment now does undergo a decided change by the death of one spouse. By common law, the husband during coverture had the sole use or profits of this estate. But by reason of the married woman's property acts in New York, each has now equal rights in the rents and profits, so long as the question of survivorship is in abeyance. (*Hiles v. Fisher*, 144 N. Y. 306; *Grosser v. City of Rochester*, 148 id. 235. See, also, *Kip v. Kip*, 33 N. J. Eq. 213.) The old idea that this estate is a unit made up of indivisible parts (*Stuckey v. Keefe's Exors.*, 26 Penn. St. 397, 399) is no longer true in New York. As to income its unity is gone. Indeed, the term "entirety" has become inexact and perhaps misleading.

With such a succession from the dead to the survivor as to one-half of the profits — and profits represent the land's usable value — it would seem strange if that succession could not be taxed.

Where a joint bank deposit was in question in case of a husband's death in 1913, the court held such a joint tenancy not taxable under the language of that earlier statute, since such property thus disposed of is not "made in contemplation of * * * death," nor "intended to take effect in possession or enjoyment at or after such death." (Tax Law, § 220, as amd. by Laws of 1911, chap. 732.) Mr. Justice WOODWARD, however, added: "If the Legislature deems such dispositions of property to be properly taxable that is a question which may be dealt with in the proper department, but this court has no power to enlarge upon the scheme of tax laws. (See *Matter of Starbuck*, 137 App. Div. 866; *Matter of Green*, 144 id. 232-234, and authorities cited.)" (*Matter of Tilley*, 166 App. Div. 240, 243.)

App. Div.]

Second Department, June, 1917.

In *Matter of Klatzl* (216 N. Y. 83) the death was in 1913. In 1906 Klatzl had deeded a property in New York to himself and wife as "tenants of the entirety," which the surrogate held effective. The Court of Appeals (reversing the surrogate and Appellate Division [166 App. Div. 921]), however, held the property taxable to one-half of its value, as, in the majority view, the conveyance created only a tenancy in common. Judge BARTLETT concurred in the result, on the express ground that, even as tenants by the entirety, one undivided half of the profits to which the husband had been entitled during his life passed into the wife's possession by the husband's death (p. 89).

Estates by the entirety, if wholly escaping the transfer tax, would be easily resorted to as a means to put valuable lands beyond taxation. This is a period when the taxing power is in full exercise, and seems to be required for the general welfare. The Legislature has clearly enlarged the statute so as to include the succession by survivorship to an estate by the entirety. Hence I advise to tax the lands held as tenants by the entirety (both strictly such, and the Yonkers land under contract of sale) for *one-half* their value. This also applies to the joint personalty, with the result that the value of the joint interest, appraised at \$64,811.89, should be halved, namely, \$32,405.95, and as thus modified the order of the Surrogate's Court of Westchester county should be affirmed, without costs of this appeal.

JENKS, P. J., THOMAS, STAPLETON and BLACKMAR, JJ., concurred.

Order of the Surrogate's Court of Westchester county modified in accordance with opinion, and as modified affirmed, without costs of this appeal.

BOARD OF HEALTH OF NEW ROCHELLE, Appellant, *v.* JOHN FARRELL, Respondent.

Second Department, June 22, 1917.

Municipal corporations — city of New Rochelle — authority of board of health to maintain action for violation of ordinance — power of board to enlarge its own powers — action in City Court — demurrer — motion to dismiss.

A city board of health has no authority to bring an action except such as may be conferred by statute.

Section 383, subdivision 2, of the charter of the city of New Rochelle, authorizing the board of health "to abate all nuisances detrimental to the public health or dangerous to human life, by action at law or in equity in the name of the city," does not authorize an action by said board for a penalty for violation of an ordinance.

A board of health cannot enlarge its own powers to bring actions by a provision in the local sanitary code.

In an action by the board of health brought in the City Court objection as to the power to bring such action cannot be taken by demurrer, and is properly raised by a motion to dismiss at the close of the evidence.

APPEAL by the plaintiff, Board of Health of New Rochelle, from a judgment of the County Court of Westchester county, entered in the office of the clerk of said county on the 29th day of December, 1916, reversing a judgment of the City Court of New Rochelle and dismissing the complaint, and also from the order pursuant to which the judgment was entered.

Edward W. Davidson, Corporation Counsel, for the appellant.

Martin J. Tierney, for the respondent.

BLACKMAR, J.:

This judgment must be affirmed without considering the interesting question of the constitutionality of the ordinance of the board of health of New Rochelle. This action, brought for a penalty for violation of an ordinance of the plaintiff, was laid in the City Court of New Rochelle. That court took judicial notice, not only of the charter of the city of New Rochelle, but also of the ordinance of the common council

(Laws of 1910, chap. 559, § 199; *City of Buffalo v. Stevenson*, 145 App. Div. 117); and whatever the court of first instance judicially recognizes without proof, that also is known by the court sitting on appeal from the judgment. (Chamberlayne Mod. Law of Evidence, § 612; *City of Buffalo v. Stevenson*, *supra*.) The board of health of the city of New Rochelle is the creature of the charter, which confers and limits its powers. An artificial body like the plaintiff has no authority to bring an action except such as may be conferred by statute. The only statutory authority conferring such power on plaintiff is found in subdivision 2 of section 383 of the charter, in the following words: "To abate all nuisances detrimental to the public health or dangerous to human life, by action at law or in equity in the name of the city." This does not authorize an action brought as the present one is. This is neither an action to abate a nuisance, nor is it brought in the name of the city. It is suggested by the appellant that such authority is conferred by a section of the local Sanitary Code; but, without reference to the fact that no such section was proved on the trial, it is not competent for the board of health to enlarge its own powers. This point could not be taken by demurrer in the City Court (Charter, § 209; Code Civ. Proc. § 2939), and it was timely raised by a motion to dismiss at the end of the evidence taken at the trial.

The judgment of the County Court of Westchester county is affirmed, with costs.

JENKS, P. J., THOMAS, STAPLETON and PUTNAM, JJ., concurred.

Judgment of the County Court of Westchester county affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY J. MOSS and JAMES K. O'CONNOR, Relators, v. BOARD OF SUPERVISORS OF ONEIDA COUNTY, Respondent.

Fourth Department, May 28, 1917.

Public officers — removal of county officer by Governor — costs of defense — County Law, section 240, construed.

The provisions of section 240 of the County Law making the reasonable cost and expense in proceedings before the Governor for the removal of a county officer upon charges a county charge only applies where the county officer has made a successful defense to the charges against him. Where the proceeding results in the removal of a county officer by the Governor for official misconduct, he is not entitled to charge the costs of his defense against the county.

CERTIORARI issued out of the Supreme Court, directed to Board of Supervisors of Oneida county, commanding them to certify and return to the office of the clerk of the county of Oneida all and singular their proceedings had in disallowing the claim of Harry J. Moss, late sheriff of Oneida county, and James K. O'Connor, his counsel, the relators herein, for the reasonable costs and expenses incurred by said Moss in proceedings before the Governor for his removal from the office of sheriff upon charges preferred against him.

George C. Morehouse, for the relators.

H. N. Harrington, County Attorney, for the respondent.

PER CURIAM:

Pursuant to section 1 of article 10 of the Constitution in proceedings for that purpose Harry J. Moss, one of the relators, was removed from the office of sheriff of Oneida county by the Governor for official misconduct on or about December 22, 1915. Subsequently, and on or about the 5th day of February, 1916, the relators presented to the defendant a verified claim for the costs and expenses of the relator Moss in such proceedings for his removal from office. On or about February 10, 1916, such claim was rejected by the comptroller of the county of Oneida. On or about May 12, 1916, such claim was disallowed by the defendant upon the ground that

the same was not a legal charge against the county. Thereupon the relators procured the writ of certiorari pursuant to which we have before us for review the proceedings of the defendant rejecting the claim of the relators.

Section 240 of the County Law (Consol. Laws, chap. 11; Laws of 1909, chap. 16) declares and defines what shall be county charges. Upon subdivisions 16 and 18 of such section the relators founded their claim for the costs and expenses which have been denied to them.

In subdivision 16 of section 240 of the County Law the following are declared to be county charges: "The reasonable costs and expenses in proceedings before the Governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein."

This provision of the County Law originated in, and is a slight modification of a part of the Supply Bill passed by the Legislature of 1874, of which the following is a copy:

"For William C. Randall, sheriff of Clinton County, in full for disbursements incurred by him on account of charges preferred against him to the Governor, by whom after investigation of the same they were dismissed, the sum of one thousand dollars.

"Hereafter in all proceedings before the Governor for the removal of any county officer upon charges preferred against him, all the costs and expenses thereof, including those of taking and printing the testimony therein, shall be a county charge upon such county, and shall be audited and allowed by the board of supervisors of such county and be included in their next annual assessment roll made thereafter, and shall be assessed, levied and collected as other county charges, and paid over to the party or parties entitled thereto by the county treasurer thereof." (Laws of 1874, chap. 323, p. 388; revised by former County Law [Gen. Laws, chap. 18; Laws of 1892, chap. 686], § 230, subd. 16.)

It will be seen from the foregoing that the legislation authorizing the allowance of costs and expenses in such proceedings for the removal of county officers was enacted in connection with the allowance by the Legislature of such costs and expenses in a case where the county officer had

made a successful defense to the charges made against him. Our attention has been called to no case where a county officer who has been removed by the Governor upon charges made against him for official misconduct has been allowed the costs and expenses incurred by him in the proceedings for his removal. While the language of the provision of the County Law in question is susceptible of the construction sought to be placed upon it by the relators, we think that in view of the origin of the provision and its history it could not have been the intention of the Legislature to clothe boards of supervisors with authority to allow a person removed by the Governor from a county office for misconduct the expenditures incurred by him in his effort to retain the office which he had forfeited by reason of his misconduct. We believe that the allowance of a claim for such expenditures would be against public policy.

We think that it is too plain for argument that the relators' claim cannot be sustained under subdivision 18 of section 240 of the County Law.

It follows that the determination of the defendant should be confirmed and the writ dismissed, with fifty dollars costs and disbursements against the relators.

All concurred; DE ANGELIS, J., not sitting.

Determination of the board of supervisors confirmed and writ dismissed, with fifty dollars costs and disbursements against the relators.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
GLENN W. TREICHLER, Respondent.

Fourth Department, May 28, 1917.

Foods — Agricultural Law, sections 200 and 201 — compound sold under name "Vanilla Flavor" — formula of compound printed in small type.

A defendant who sold under the name "Vanilla Flavor" a compound or mixture of which only a small part was extract of vanilla may be convicted of a violation of sections 200 and 201 of the Agricultural Law, although the formula was printed on the label with the word "compound,"

App. Div.]

Fourth Department, May, 1917.

if the type was so small as not to attract the notice of purchasers except upon a close inspection. It was error to rule as a matter of law that the defendant had not violated the statute.

MERRELL, J., dissented.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Niagara on the 14th day of February, 1916, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

Michael J. Noonan [*Charles M. Stern* of counsel], for the appellant.

A. F. Premus, for the respondent.

PER CURIAM:

Defendant on September 30, 1913, sold under the name "Vanilla Flavor" a compound or mixture of several substances, of which only a small part was extract of vanilla. The formula was printed on the label together with the word "compound," but in type so small as not to attract the notice of purchasers, except upon close inspection.

We think the trial court erred in ruling as matter of law that defendant had not violated sections 200 and 201 of the Agricultural Law (Consol. Laws, chap. 1; Laws of 1909, chap. 9). We are of opinion that the evidence would support a finding that the article was both adulterated and misbranded within the meaning of those sections.

To the ordinary purchaser "Vanilla Flavor" would signify extract of vanilla for flavoring.

The case is in principle the same as *People v. Butler, Incorporated* (134 App. Div. 151; 148 id. 928; affd., 212 N. Y. 613).

The judgment entered on the nonsuit must be reversed and a new trial ordered, with costs to appellant to abide the event.

All concurred, except MERRELL, J., who dissented.

Judgment reversed and new trial granted, with costs to appellant to abide event.

JOHN W. ECKMAN, Suing Individually and as Representing All Other Stockholders of the VINCULO SUGAR CANE COMPANY, Similarly Situated, and Who May Desire to Come in as Parties Plaintiff Herein, Appellant, v. CHARLES LINDBECK and Others, Respondents.

Fourth Department, May 23, 1917.

Deposition — representative action to compel directors to account — examination of defendants before trial.

Plaintiff, a stockholder, who brings a representative action against his corporation and its directors under sections 90 and 308 of the General Corporation Law to compel the directors to account for moneys alleged to have been diverted by them from the corporation, by making improvident contracts with subsidiary corporations whereby the plaintiff was deprived of his share of dividends which should have been declared, is entitled to examine the defendants before trial to elicit proof of facts material to his cause of action which are controverted by the defendants and of which they have knowledge. And this is so, although the plaintiff might make the same proof by other witnesses.

In other words, the plaintiff need not show, in order to be entitled to such examination, that the evidence is absolutely necessary.

Order for examination of defendants modified.

APPEAL by the plaintiff, John W. Eckman, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Chautauqua on the 9th day of April, 1917, limiting an order previously obtained by him for the examination of the individual defendants before trial.

Allen E. Bargar and John S. Leonard, for the appellant.

J. Delevan Curtiss, for the respondents.

DE ANGELIS, J.:

The action is claimed to be a representative action brought by a stockholder against a corporation and its directors under sections 90 and 308 of the General Corporation Law (Consol. Laws, chap. 23; Laws of 1909, chap. 28) to compel the directors to account for moneys diverted by them from the corporation.

The Vinculo Realty Company is a foreign corporation, organized under the laws of the State of Delaware, and owns a large tract of land in the island of Cuba.

The Vinculo Sugar Cane Company, the defendant corporation, is also a foreign corporation, organized under the laws of the State of Delaware, and keeps and maintains an office for the transaction of business in the city of Jamestown in the State of New York.

The defendants, all of whom (except the defendant Alonzo J. Thompson, residing in the State of Pennsylvania) reside in the city of Jamestown, and one Harry W. Davis, who resides in the State of Delaware, are stockholders in, and directors of, the Vinculo Sugar Cane Company. Such persons have been the directors of such corporation since its organization.

The plaintiff is a resident of the city of Jamestown. He alleges that he is a stockholder in the defendant corporation, which is denied by the defendants.

The plaintiff and the defendants, except the defendant corporation, are stockholders in, and directors of, the Vinculo Realty Company.

The Vinculo Sugar Cane Company was organized for the purpose of producing sugar cane in the island of Cuba and leased from the Vinculo Realty Company a tract of land containing 5,000 acres in Cuba for that purpose.

This land so leased needed clearing and preparing for planting the sugar cane and the defendant corporation entered into a contract with the plaintiff whereby the plaintiff undertook to clear the leased land, prepare the same for planting and plant the same with sugar cane, in which contract, among other things, it was provided in behalf of the stockholders of the defendant corporation that the sale of the shares of the corporation should be limited to one share for each acre of the leased land so improved.

In the operations of the defendant corporation it became necessary to arrange for the transportation of the sugar cane to market and such directors of the defendant corporation individually devised a plan for such transportation. They constituted one of their members a trustee to act for them and they raised the money and placed the same in his hands to construct a private railway about three miles in length, and in his name for them procured from the Vinculo Realty Company the right to construct the railway. The money was

raised and the railway constructed, which is called "The Vinculo and Limones Railway." Such trustee, acting for such individuals, made a contract with the defendant corporation for the transportation of the sugar cane produced by the latter over the railway at sixty cents per ton.

It appears that approximately eighty-five per cent of the capital stock of the defendant corporation and approximately seventy per cent of the capital stock of the Vinculo Realty Company are owned and controlled by the individual defendants.

The plaintiff claims that the price agreed upon for such transportation of the sugar cane is exorbitant and large sums of the money of the defendant corporation have been paid out for such transportation; that the directors of the defendant corporation have expended large sums of money unnecessarily in the erection of buildings on the property leased; and that such directors sold a large amount of the stock of the defendant corporation in violation of such agreement made with the plaintiff. Plaintiff claims by this expenditure of such exorbitant sums for the carriage of the sugar cane over such railway, by the unauthorized sale of the stock of the defendant corporation and by the unauthorized expenditure of moneys of the defendant corporation for such unnecessary buildings and improvements, the moneys which should have been paid to the plaintiff and the other stockholders in dividends have been reduced wrongfully and in violation of the rights of the plaintiff and the other stockholders and asks that the defendants account for the moneys so diverted from the defendant corporation.

The defendants have interposed an answer admitting their relationship to such corporations, but denying the illegal acts.

After issue joined, upon the pleadings and affidavits the plaintiff obtained an order for the examination of the individual defendants before trial. These defendants upon affidavits made in their behalf, applied to the Erie Special Term to vacate such order. Upon such application further affidavits were read in favor of the parties and the order was granted which is under review and which limited the examination of the defendants to the question whether or not the plaintiff was a stockholder of the defendant corporation. This order also contained the following provision: "without

App. Div.]

Fourth Department, May, 1917.

prejudice to the right of the plaintiff to make further application for the examination named in the said order, as bearing upon the question of accounting and the other allegations of the complaint after interlocutory judgment establishing and adjudging that the plaintiff is a stockholder of the defendant corporation."

The plaintiff shows sufficient reasons to justify the omission of the plaintiff to demand that the defendant corporation should bring the action. (*Sage v. Culver*, 147 N. Y. 241; *Jacobson v. Brooklyn Lumber Co.*, 184 id. 152, 161; *Seagrist v. Reid*, 171 App. Div. 755; *Anderton v. Wolf*, 41 Hun, 571.)

The application for the order for examination was made under section 870 of the Code of Civil Procedure and rule 82 of the General Rules of Practice.

The plaintiff has a right to examine the defendants to elicit proof of any fact material to the plaintiff's alleged cause of action controverted by the defendants, of which the defendants have any knowledge, and this is so whether the plaintiff might make the same proof by some other witness or witnesses or not. The rule is not and never has been that the plaintiff must show in order to get the benefit of such an examination that the evidence is absolutely necessary, because some of the reasons for such manner of proving the plaintiff's case are the saving of the time which would otherwise be consumed in the trial courts and the convenience resulting to the plaintiff and to those who might otherwise have to be called as witnesses.

The provision in the order appealed from indicating that an interlocutory judgment could be predicated upon the establishment of the fact that the plaintiff is a stockholder of the corporation, is based upon an erroneous view of the law. Such fact would not authorize such a judgment.

Most of the authorities cited by the respondents involve actions for accountings between partners where the basis for the accounting is the establishment of the partnership relation which may be the subject of an interlocutory judgment. The case of *Stokes v. Stokes* (91 Hun, 605), however, cited by the respondents, was a stockholders' action similar to this, in other words, an action "to compel the defendant officers to account for official misconduct." There the court held

that such was not an action for an accounting, and, therefore, could not be compulsorily referred. There may be an interlocutory judgment in such a case providing for an accounting before a referee, as there may be in many equity cases, but the basis for the interlocutory judgment must be the establishment of the official misconduct of the directors of the corporation.

It is entirely clear that the original order for the examination of the defendants herein was too general and should have been limited to certain particular subjects. (*Seagrist v. Reid, supra.*) But we think the order of the Special Term was made under a misapprehension and so limited the scope of the proposed examination as practically to make the same of no value.

We think the examination of the defendants should be confined to the matter of the amount paid for the transportation of the sugar cane, to the matter of the expenditures by the defendant corporation for the buildings and improvements on the leased property and to the amount of stock sold by the defendant corporation since relations were broken off between the company and the plaintiff.

The order providing for the modifications thus indicated may be settled on two days' notice.

All concurred; LAMBERT, J., not sitting.

Order modified in accordance with the opinion, and as so modified affirmed, without costs of this appeal to either party. Order to be settled before DE ANGELIS, J., on two days' notice.

JOHN R. HARDIN and BENJAMIN WILLIAMSON KEEN, as Trustees under the Last Will and Testament of OSCAR KEEN, Deceased, Appellants, v. GEORGE H. ROBINSON and Others, Respondents.

First Department, December 29, 1916.

Partnership — dissolution — partnership at will — joint adventure to accomplish specified object — when joint adventurers cannot terminate agreement and exclude fellow-adventurer — accomplishment of enterprise.

Where a partnership is not limited as to time and there is nothing to show the intention of the parties as to its duration, it is a partnership at will and may be terminated at any time at the option of a partner.

App. Div.]

First Department, December, 1916.

But where a partnership, or joint adventure, has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished, and until that time arrives one partner cannot terminate the partnership and continue the enterprise for his own benefit.

Such partnership or joint adventure for the achievement of a specified result can only be terminated by the consent of all the partners interested. Action by a testamentary trustee for an accounting as to a share of commissions alleged to be due to his testator who, with the defendants, had embarked in a joint adventure to find a purchaser for a manufacturing plant under an agreement to divide the commissions earned. Evidence examined, and held, that as the joint adventure was entered into for the accomplishment of the purpose aforesaid and as that result had actually been achieved by the testator's partners, their attempt to repudiate the agreement and to deprive him of his share of the profits was ineffective and they should be required to account.

Said joint adventure cannot be said to have been impossible of accomplishment so as to end the partnership when as a matter of fact the object was accomplished.

APPEAL by the plaintiffs, John R. Hardin and another, as trustees, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 6th day of June, 1916, upon the report of a referee appointed to hear and determine the issues.

Elbridge L. Adams, for the appellants.

Chester A. Jayne, for the respondents.

PAGE, J.:

The action was brought by the trustees under the last will and testament of Oscar Keen, deceased, for an accounting from the defendants for the proceeds of a certain joint adventure. The contested questions of fact were largely found in favor of the plaintiffs and are briefly stated as follows:

In the month of January, 1907, Oscar Keen, Merle Middleton and George Frederick Keene associated themselves together in a joint adventure to buy and sell the Baldwin Locomotive Works, a large manufacturing plant in Philadelphia, Penn., owned by Burnham, Williams & Co., a copartnership. Some time later, but prior to July, 1908, the firm of Fisk & Robinson, bankers, of New York city, came into said joint adventure,

and, in the person of George H. Robinson, one of the members of the firm, took an active part therein. By a letter dated September 29, 1908, written by Oscar Keen to Fisk & Robinson, the terms of which were accepted by said Fisk & Robinson by a letter dated December 30, 1908, it was agreed that, in the event of there being received by either Fisk & Robinson or Oscar Keen any commission arising from the purchase and sale of the Baldwin Locomotive Works, Fisk & Robinson were to have one-half thereof, and Oscar Keen and his associates one-half thereof, in whatever the said commission should be paid, whether cash or securities. Oscar Keen further wrote to his associates, Merle Middleton and George Frederick Keene, agreeing with them as to the division between themselves. Oscar Keen personally and through Frederick J. Stimson, who had family connections with one or more of the firm of Burnham, Williams & Co., endeavored to secure, if possible, an option on the Baldwin Locomotive Works, or a price at which they would be willing to sell. These negotiations were continued during the years 1907, 1908 and until March, 1909, but without success, because the seven members of the firm of Burnham, Williams & Co. could not agree among themselves as to the sale of, or the price to be asked for, the said works.

In order to overcome these difficulties, Stimson made the suggestion to one or more members of said firm that they should be incorporated. On or about February 19, 1909, Alba B. Johnson, one of the members of said firm, with whom Oscar Keen had personal interviews and considerable correspondence, wrote to Oscar Keen that, "after the most careful consideration of the matter, we conclude that we are not disposed at this time to entertain a proposition." In reply to this Oscar Keen wrote to A. B. Johnson, on or about March 8, 1909, that he had had a conference with his principals, who "regret that the matter cannot be taken up now, but trust that in the near future there may be a reconsideration of the subject, in which event I will be pleased to hear from you." This letter was communicated to Merle Middleton, who had a desk in the office of Fisk & Robinson, on or about March 26, 1909. On or about April 8, 1909, Fisk & Robinson wrote to Oscar Keen as follows: "We beg to advise

App. Div.]

First Department, December, 1916.

that we had a final conference on Tuesday last in respect to the negotiations referred to in your letter under date of September 29, 1908, and it was mutually agreed to discontinue all negotiations, thus confirming the decision set forth in Mr. Johnson's letter to you under date of February 19th. In view of the conclusion of the negotiations, the agreement as set forth in our letter under date of December 30th last is, of course, terminated."

The "final conference" referred to in said letter was a conference between the said Fisk & Robinson, Merle Middleton and George Frederick Keene, at which Oscar Keen was not present, and of which he had no notice. In answer to this letter, Oscar Keen wrote Fisk & Robinson on April 9, 1909: "I am in receipt of your letter of April 8, and was not aware that you had a final conference on Tuesday last in regard to the negotiations. If you look at the copy of Mr. Johnson's letter of February 19, 1909, you will observe that he used these words, 'We conclude that we are not disposed *at this time* to entertain a proposition,' implying that at some future time a proposition might be entertained. I thought that, in view of the recent death of Mr. Henszey, the future time might be approaching. Before consenting to the termination of the agreement as set forth in your letter to me of December 30, 1908, I would like to discuss the matter with you, and will soon call on you. Is there anything new in this affair?"

There is no evidence, either that Fisk & Robinson replied to this letter, or that Oscar Keen called and discussed the matter with them. In August, 1909, the Baldwin Locomotive Works having been incorporated, Robinson and Middleton agreed to renew the negotiations for the purchase and sale of the said works on a commission basis, with the understanding, as between themselves, that, in the event of a commission resulting, one-half was to be given to Merle Middleton, out of which he was to take care of George Frederick Keene, the other half to Robinson. Oscar Keen was not present, nor invited to be present, it being the intention of the parties to the transaction to exclude him from any participation in the profits which might result from the adventure. In the month of October, 1909, negotiations were resumed by the defend-

ant Robinson with Alba B. Johnson, representing all the stockholders of the Baldwin Locomotive Works, for an option upon the stock, at which it could be sold to a purchaser, whom Robinson might procure. The negotiation came to an end temporarily in the month of May, 1910, when the banking firm of Kuhn, Loeb & Co., to whom Robinson had introduced Johnson, declined to purchase the stock of the Baldwin Locomotive Works, but did finance a bond issue of \$15,000,000.

Fisk & Robinson went into bankruptcy in February, 1910, and thereafter Robinson demanded and received from the Baldwin Locomotive Works \$50,000, which he divided with Middleton, George Frederick Keene receiving \$12,500 from Middleton. In September, 1910, an agreement was made between Robinson and Johnson that, if a sale should be made to Kuhn, Loeb & Co., certain commissions should be paid to Robinson, based upon price realized. Kuhn, Loeb & Co. made an offer, and while negotiations were pending the Baldwin Locomotive Works were sold to other parties. Robinson then brought an action against Johnson, in Philadelphia, Penn., for commissions, upon the ground that he had put Johnson, as representing all the stock of the Baldwin Locomotive Works, in communication with a responsible and willing purchaser, and that there had been an agreement between them that these negotiations should be continued until they either agreed upon terms or agreed that they could not agree. Robinson recovered judgment for \$125,000, which was paid to him on or about December 14, 1914. He paid for expenses of the action \$32,055.75, divided \$46,472.12 between himself and partners, and deposited \$46,472.13 in the American Exchange National Bank, where it still remains.

The learned referee drew the legal conclusion from these facts that the joint adventure entered into between Oscar Keen, his associates, and Fisk & Robinson in December, 1908, being indefinite as to time, was a partnership at will, terminable at any time by any party thereto; that at the time the same was terminated performance thereof was impossible. For these reasons the plaintiff could not recover.

It is true that where a partnership is not limited as to time, and there is nothing to show the intention of the parties as to its duration, it will be held to be a partnership at will.

But where a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished. There is, then, a term fixed by the copartnership agreement, and until that time arrives one partner cannot terminate the partnership and continue the enterprise for his own benefit.

Nor can the other partners, without his consent, exclude one partner from participation and take to themselves the profits. It may be terminated at any time by consent, but the consent must be mutual. A joint adventure is subject to exactly the same rules as a technical partnership. (*Spier v. Hyde*, 92 App. Div. 467, 472; *King v. Barnes*, 109 N. Y. 267, 285.) "Elementary writers quite uniformly agree as to the causes which effect the dissolution of partnerships. Among other things, it is said that when the further prosecution of the enterprise becomes illegal or impossible, or when its object has been * * * accomplished, it has arrived at the period which was necessarily contemplated for its dissolution." (*Kennedy v. Porter*, 109 N. Y. 526, 549.) In the present case the joint adventure was not terminated by mutual consent, nor had its object been accomplished, nor had the enterprise become illegal.

There remains to be considered the finding of the referee that it was impossible of accomplishment. It would seem to be a sufficient answer to that statement that the object of the joint adventure was accomplished. The word "impossible" is defined by the Standard Dictionary as meaning: "Beyond the reach of power to accomplish. * * * Impracticable in the nature of the case."

Difficulty or present improbability of accomplishment does not constitute impossibility. (See *Cameron-Hawthorn Realty Co. v. City of Albany*, 207 N. Y. 377, 381.) There was a possibility of accomplishing the object of this joint adventure, which had been suggested during Keen's negotiations; i. e., by the incorporation of the Baldwin Locomotive Works. It was the probability that this result might be accomplished that was suggested in Johnson's letter to Keen and Keen's reply. There was, therefore, no dissolution of the joint adventure, and the defendants are accountable to the plaintiffs for Oscar

Keen's share of the profits. The net profits of the enterprise have been found by the referee to be \$142,944.25. Of this amount Oscar Keen was entitled to receive one-sixth part, or \$23,824.04.

The judgment will, therefore, be reversed, with costs to the appellants, and judgment directed for the plaintiffs for the sum of \$23,824.04, with interest on the sum of \$8,333.34 from May 14, 1910, and on the sum of \$15,539.70 from the 14th day of December, 1914, together with costs. Order reversing the findings of the referee inconsistent herewith, and making findings in accord with this opinion, to be settled on notice.

CLARKE, P. J., LAUGHLIN, DOWLING and DAVIS, JJ., concurred.

Judgment reversed, with costs, and judgment ordered for plaintiff as stated in opinion, with costs. Order to be settled on notice.

NEAL, CLARK & NEAL COMPANY, Plaintiff, v. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, Defendant.

Fourth Department, May 16, 1917.

Insurance — indemnity against theft of motorcycle — policy construed — insurance issued to vendor and to conditional vendee — theft of motorcycle by vendee — when insurer liable to vendor — waiver of requirement as to notice — evidence — conditional bill of sale.

Where an insurance policy covering the loss of a motorcycle by theft was issued both to the seller of the machine and to the purchaser under a conditional bill of sale "as interest may appear" and covered loss "by theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured" both the interest of the vendor and the conditional vendee were insured, and as respects the vendor's interest in the policy the vendee was not within the exception. Hence, where the conditional vendee himself stole the motorcycle, the vendor is entitled to recover of the insurance company.

Although the policy of insurance was to be void unless the insured rendered a sworn statement of loss to the insurer within sixty days of the loss, the defendant by denying its liability before the sixty days had expired waived the requirement as to notice.

In such action the conditional bill of sale was properly admitted in evidence.

MOTION by the defendant, The Liverpool and London and Globe Insurance Company, Limited, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the rendition of a verdict in plaintiff's favor by a jury at the Erie Trial Term in May, 1916.

Eugene M. Bartlett and *Walter W. Chamberlain* for the plaintiff.

McGuire & Wood [*Hiram R. Wood* of counsel], for the defendant.

KRUSE, P. J.:

The action is upon an insurance policy issued by the defendant upon a motorcycle, covering loss by theft. The defendant contends (1) that the policy does not cover the loss, (2) that the plaintiff failed to give notice and serve proof of loss as required by the policy, (3) that proof of theft is lacking, and (4) the court erred in admitting certain evidence. The policy insured the plaintiff and one George M. Arthur "as interest may appear," to an amount not exceeding \$300, covering among other losses, "loss or damage if amounting to Twenty-five dollars (\$25) or more on any single occasion by theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured."

1. The plaintiff sold the motorcycle by a conditional bill of sale to Arthur. The verdict is for the amount due and unpaid to plaintiff for the purchase price. The proof tends to show that Arthur, one of the insured, himself, stole the motorcycle, and the question is whether the plaintiff, the other insured, may recover for its interest in the motorcycle.

I am of the opinion that the policy covers the plaintiff's loss. It in effect insured each interest separately, namely, that of the plaintiff, the conditional vendor, and of Arthur, the conditional vendee, and by its express terms covers theft by any person other than such as are expressly excepted by the terms of the policy. As to the plaintiff's interest, Arthur is not within this exception.

2. As to the plaintiff's failure to give notice, and serve proof of loss, and the contention that proof of theft is lacking, it appears that Arthur left the State with the motorcycle. He claimed that it had been stolen from him, and gave notice

to the insurance company to that effect. The insurance company, after investigation, became satisfied that the motorcycle had not been stolen from Arthur, and finally contended that it had not been stolen at all and denied its liability to the plaintiff. The plaintiff, evidently relying upon the information received from Arthur, likewise gave notice to the defendant, claiming that the motorcycle had been stolen from Arthur, but finally concluded that Arthur himself had stolen the motorcycle. Before reaching that conclusion, however, it had taken an assignment from Arthur of his claim against the defendant for his loss, and that claim was included in the complaint, but abandoned upon the trial. Both the plaintiff and the defendant seem to have made efforts to find Arthur and the motorcycle, but neither has been found.

I think the evidence is sufficient to establish the theft, and also that timely notice thereof was given by the plaintiff to the defendant. The policy contains the condition that "In the event of loss or damage the insured shall forthwith give notice thereof in writing to this Company or the authorized agent who issued this policy and protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and cause of the loss or damage; the interest of the insured and of all others in the property." Then follow other requirements which are not involved in this controversy, after which it is provided as a condition of the policy "that failure on the part of the insured to render such sworn statement of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company), shall render such claim null and void."

The defendant contends that the time for rendering such statement commences to run from the time of the theft, and not from the time that the insured discovered the same. As to this, it is enough to say that the trial judge held with the defendant upon that question, but the jury found that before the expiration of sixty days from the time the motorcycle was stolen the defendant denied its liability and waived the require-

App. Div.]

Second Department, June, 1917.

ment to render such statement. While the evidence is not clear as to when the theft was committed, I think it cannot be held that there is no evidence to sustain this finding.

3. The only exception urged to the admission of evidence is the ruling admitting the conditional bill of sale. If I am right, that the policy insured the interest of each of the insured in the motorcycle, as has been stated, clearly it was properly received.

The defendant's exceptions should be overruled, its motion for a new trial denied, and judgment directed on the verdict for the plaintiff, with costs.

All concurred.

Defendant's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the plaintiff upon the verdict, with costs.

JOHANNA HEGSTAD, Appellant, v. LEO WYSIECKI and CECILLIA VON WARZEWSKA, Respondents.

Second Department, June 22, 1917.

Real property — grant to one where consideration paid by another — moral obligation of grantee to reconvey limited by duty to make good loss suffered by tenants through negligence — transfer with intent to defraud judgment creditor.

Where the purchaser of apartment houses paid the consideration and took title in the name of his cousin, who was his housekeeper and who paid no consideration, but agreed to manage the property, and, after paying to the purchaser a certain amount of the rents, retained the balance, and the said cousin, after the commencement of an action against her for injuries caused by her negligence as owner and landlord, reconveyed the premises to the purchaser, the only consideration being a moral obligation, said transfer should be set aside on the ground that it was made with intent to defraud the judgment creditor.

The moral obligation of the owner of the title to reconvey was limited by her duty to make good the loss suffered by tenants through her fault as landlord while she held title.

APPEAL by the plaintiff, Johanna Hegstad, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 6th

day of July, 1916, upon the decision of the court dismissing the complaint after a trial at the Kings County Special Term.

The action was brought to set aside certain conveyances on the ground that they were made with intent to defraud the plaintiff, a judgment creditor.

Edgar J. Treacy, for the appellant.

S. C. Weinberg, for the respondents.

BLACKMAR, J.:

The evidence in this case, all elicited by plaintiff from the defendants and their attorney, is without dispute or contradiction.

In 1910 the defendant Wysiecki, a priest of the Roman Catholic Church, purchased ten apartment or flat houses in Halsey street, Brooklyn, paid the consideration and took the title in the name of his cousin, Cecillia Von Warzewska, who was his housekeeper. At about the same time he conveyed sixteen other flat houses to her. No consideration was paid by Von Warzewska, but the understanding was that she should manage the property, pay to Wysiecki \$5,000 a year and keep the remainder of the rents herself. The motive behind the conveyance, as given by the grantee, was that he as a priest was not permitted to hold real property. The only reasonable inference from this evidence is that the grantee held the title to the property for and recognized Wysiecki as the real owner.

On July 14, 1914, the plaintiff, a tenant in one of the apartments, brought an action against Von Warzewska to recover damages for injuries caused by the negligence of defendant as owner of the premises. In 1914 and 1915 the rentals of the property did not produce enough to pay the \$5,000 per annum, and on April 15, 1915, at the request of Wysiecki, all the twenty-six houses were conveyed to him.

The property in 1910 was worth, over and above mortgages, about \$100,000. In April, 1915, it was worth about \$50,000. Wysiecki knew all about the plaintiff's action; he employed and paid a lawyer to defend it. The conveyance to him left Von Warzewska entirely insolvent, as she had no other property. Subsequently plaintiff recovered judgment, and, execution having been issued and returned unsatisfied,

App. Div.]

Second Department, June, 1917.

brought this action to set aside the conveyances as made with intent to hinder, delay and defraud her. The complaint was dismissed, with a finding of fact that the conveyances were made on a good and valid consideration and without intent to defraud plaintiff.

We are not satisfied with the decision of the learned justice, nor with the finding of fact on the subject of fraudulent intent.

When the ten flat houses in Halsey street were purchased by the defendant Wysiecki, who paid the consideration, taking the title in the name of his cousin Von Warzewska, she became the owner, and no interest cognizable either in a court of law or equity vested in Wysiecki. (Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 94.) When the remaining sixteen houses were conveyed by Wysiecki to Von Warzewska, she became the absolute owner thereof, and as to these also no interest remained in defendant Wysiecki cognizable either in a court of law or equity. (Real Prop. Law, §§ 91, 92, 93, 242; *Sturtevant v. Sturtevant*, 20 N. Y. 39.) Von Warzewska became what the real estate interests have denominated a dummy, which term has become well recognized to mean a person who holds the legal title to real property under a moral obligation to recognize another as the owner. Originally, such moral obligation was a trust which would be executed by a decree in chancery. (1 Spence Jurisdiction of the Court of Chancery, 495.) But this the statutes above cited now prevent. Sometimes if there is an oral agreement to reconvey, void under the Statute of Frauds because not in writing, partial performance by the plaintiff may enable a court of equity to enforce a reconveyance in order to prevent a fraud. (*McKinley v. Hessen*, 202 N. Y. 24.) But it was not intended by this decision, although it seemed to legalize the dummy, to nullify the Statute of Frauds or judicially repeal section 242 of the Real Property Law, and it is still the law that the grantee takes the whole title, both legal and equitable. We mean by an equitable title, as we now use the term, one which is enforceable in a court of equity. Nevertheless, a moral obligation may exist which is not enforceable either in law or equity, and which may be a good consideration for a promise or conveyance. (*Davis v. Graves*, 29 Barb. 480; *Dunn v. Whalen*, 21 N. Y. Supp. 869;

Moore Fraud. Conv. chap. 14, § 9; *Holden v. Burnham*, 2 Hun, 678.) A familiar instance is a moral obligation to pay a debt barred by the Statute of Limitations (Code Civ. Proc. § 395; *Levy v. Popper*, 106 App. Div. 394; affd., 186 N. Y. 600), or bankruptcy. (*Dusenbury v. Hoyt*, 53 N. Y. 521.) The opinion of the learned justice shows that it is upon this principle that he held that the conveyance of the twenty-six parcels by defendant Von Warzewska to defendant Wysiecki was not in fraud of plaintiff's demand.

But we think the fact was overlooked that the claim of the plaintiff grew out of the ownership of the property. The defendant Von Warzewska was liable to plaintiff because, and only because, she was the legal owner of the property. The doctrine on which the learned justice rested the decision of this case is founded on the theory that the moral obligation to reconvey is superior to the obligation to satisfy her own personal debts. Even the rule would not apply if the dummy's apparent ownership of the property gave her a credit which induced the creditor to trust her. (*Budd v. Atkinson*, 30 N. J. Eq. 530; *Besson v. Eveland*, 26 id. 468; *Fritz v. Worden*, 20 App. Div. 241.) And the rule itself does not prevail in some jurisdictions. (*Chapin v. Pease*, 10 Conn. 69.) Certain obligations and liabilities are apt to attach to the ownership of real property; and when one conveys to another to hold on a secret trust, he must contemplate the probability that his grantee may incur such liabilities. To such liabilities, certainly those growing out of occupation by a tenant, it is but just to hold that the obligation to reconvey is subject. Although the Real Property Law (§ 265) provides that in cases like this the question of fraudulent intent is one of fact, yet if a debtor conveys all his property without consideration, the inference of fraud naturally and necessarily follows. The case, therefore, turns on the question of a consideration for the transfer. The consideration is a moral obligation only. Its sufficiency must be brought to the test of moral considerations. Is it in accord with equity and good conscience that the conveyance should prevail against plaintiff? If not, there is no moral obligation to convey superior to plaintiff's claim. To that extent, therefore, the conveyance does not rest on a moral obligation. The defendant Wysiecki con-

App. Div.]

Second Department, June, 1917.

veyed the legal title to Von Warzewska. This carried with it certain obligations and duties to tenants. She failed to perform those duties, and out of such failure the plaintiff's demand arose. It seems to us that the obligation to reconvey is limited by the duty to make good the loss suffered by tenants through her fault as landlord while she held the title for Wysiecki's benefit. As to the plaintiff, therefore, the obligation does not exist, and the conveyance is voluntary. If voluntary, it must be held fraudulent. This conclusion is in accordance with natural justice, on which all law is founded. And if we have found no authorities directly for it, neither have we found any against it. The use of the dummy in perpetrating frauds is prevalent enough as it is. It would be a more efficient agent for that purpose if we should hold that by carrying property in the name of a dummy, the secret owner could hold it discharged from the liabilities which attach to ownership.

The judgment is reversed, the 8th, 9th, 10th, 12th and 13th findings of fact and the facts found in the 1st and 2d so-called conclusions of law in the decision disapproved, and a new trial granted, costs to abide the final award of costs.

JENKS, P. J., THOMAS, STAPLETON and MILLS, JJ., concurred.

Judgment reversed, the 8th, 9th, 10th, 12th and 13th findings of fact and the facts found in the 1st and 2d so-called conclusions of law in the decision disapproved, and a new trial granted, costs to abide the final award of costs.

EDWARD H. MOUBRAY, Respondent, v. G. & M. IMPROVEMENT COMPANY, Appellant.

Second Department, June 23, 1917.

Real property — restrictive covenant construed — when small retail stores not dangerous, noxious or offensive to neighboring inhabitants — injunction.

A restrictive covenant, which provides that neither the purchaser nor her heirs or assigns will ever permit to "be erected or carried on or established in any manner whatever any slaughter house, tallow chandlery, smith

shop, furnace foundry, nail or other factory or any manufactory for making starch, glue, varnish, vitriol, oil or gas or for tanning, dressing, repairing or keeping skins, hides or leather, or any distillery, brewery or sugar bakery, lime kiln, coal yard, railway or other stable or depot or car house or any manufactory, trade, business or calling, which may be in anywise dangerous, noxious or offensive to the neighboring inhabitants," does not prohibit the construction of several small retail stores with dwelling apartments above, upon the ground that they are "noxious or offensive" so as to warrant the court in enjoining their completion. The meaning of such a covenant is a question of law and no business is "dangerous, noxious or offensive" unless it is so in the same manner that the prohibited trades are.

APPEAL by the defendant, G. & M. Improvement Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of June, 1916, upon the decision of the court after a trial at the Kings County Special Term.

The judgment enjoined the completion of certain buildings in Underhill avenue on the ground that they were erected in violation of a restrictive covenant and directed the removal of the part thereof actually constructed.

Lynn C. Norris [*Edward M. Perry* with him on the brief], for the appellant.

Alfred G. Reeves [*Alexander S. Rowland* and *William P. Dalton* with him on the brief], for the respondent.

BLACKMAR, J.:

The plaintiff has obtained a judgment enjoining the defendant from completing the construction of certain buildings on Underhill avenue, designed to be used as retail stores, and directing it to forthwith remove them. The judgment is based on a finding that the erection of such buildings violates a restrictive covenant which reads as follows: "And the said party of the second part for herself, her heirs and assigns doth hereby covenant to and with the said City of Brooklyn, its successors or assigns that neither the said party of the second part nor her heirs or assigns will ever permit any building at any time to be erected or remain on said lot within five feet of Underhill Avenue, Butler Street, nor Butler Place respectively, nor unless it be constructed of brick, stone or iron and at least thirty feet high from side-

walk to cornice with metallic or slate roof, nor shall there at any time be erected or carried on or established in any manner whatever any slaughter house, tallow chandlery, smith shop, furnace foundry, nail or other factory or any manufactory for making starch, glue, varnish, vitriol, oil or gas or for tanning, dressing, repairing or keeping skins, hides or leather, or any distillery, brewery or sugar bakery, lime kiln, coal yard, railway or other stable or depot or car house or any manufactory, trade, business or calling, which may be in anywise dangerous, noxious or offensive to the neighboring inhabitants."

When the action was tried the buildings were incomplete; but their intended use was plainly indicated by the plans filed, and it is conceded that they were designed to be and would be used as retail stores with dwelling apartments above. It is not contended that the buildings or the use to which they were to be put fell within the class of structures or uses prohibited by express naming; but it was claimed by the plaintiff and found by the court that they were being built in violation of the concluding clause of the restrictive covenant, in that they were in some wise dangerous, noxious or offensive to the neighboring inhabitants. There might be a somewhat arbitrary classification of different kinds of business as dangerous or not to neighboring inhabitants, but in any such classification a small retail store would hardly fall. The word "noxious," whose derivation and use suggest that which causes or tends to cause injury, especially to health or morals, could not be properly applied to a small retail store.

It is obvious that if the covenant were confined to prohibiting any manufacturing business or calling described by the adjective "offensive," it would be too indefinite and uncertain for practical enforcement. Individual taste determines what is offensive, and the saying, *de gustibus non est disputandum*, might almost rank as a legal maxim. The adjective has direct relation to the person whose tastes are consulted, and a delicate, supersensitive organization might take deep offense from that which would be a matter of indifference to one of coarser fibre.

But, fortunately, the covenant contains more than these adjectives. It specifies a number of factories and businesses which are prohibited; and then, because there may be others

unenumerated which would after the same manner affect the neighboring inhabitants, it contains a general clause in which the adjectives are used. It specifies kinds of business which grossly offend the senses of smell and hearing, and others, like railway depots or car barns, which not only offend these senses but introduce a peculiar element of danger in the use of the streets. The general clause is meant to prohibit other kinds of business which are dangerous, noxious or offensive in the same manner as those specified are. This is the doctrine *noscitur a sociis*. And there is no more useful canon of interpretation. The meaning of this covenant is purely a question of law; and no business is dangerous, noxious or offensive unless it is so in the same manner that the prohibited trades are. But a retail store is neither dangerous to the neighboring inhabitants, as for instance a railway depot or car house, nor is it noxious as a manufactory for making vitriol, oil or gas, or offensive as a slaughterhouse, tallow chandlery, furnace foundry, nail or other factory; and so the comparison might be carried on with all the prohibited industries. The respondent treats the question very gingerly, and suggests that the doctrine *noscitur a sociis* is satisfied by comparing a retail store, as for instance grocery store or drug store, with a manufactory for tanning, dressing, repairing or keeping skins, hides or leather, italicizing the word "keeping." Probably the most common use of land in a large city, next after dwellings and apartments, is for the erection of retail stores, and if it had been intended to forbid such use, stores would have been prohibited, or the use confined to dwellings.

We do not think that a small retail store, or nine of them, is forbidden by the covenant in question, and this view seems to be in accord with the authorities. We cite a few cases illustrating the method used by the courts in interpreting covenants restricting the use of land: *Biggs v. Sea Gate Association* (211 N. Y. 482); *Rowland v. Miller* (139 id. 93); *Kitching v. Brown* (180 id. 414); *Tobey v. Moore* (130 Mass. 448). The cases cited by the respondent, *i. e.*, *Reynolds v. Cleary* (61 Hun, 590); *Goodrich v. Pratt* (114 App. Div. 771); *Simons v. Mutual Construction Co.* (132 id. 719); *Dieterlen v. Miller* (114 id. 40), are all cases which involved the question whether covenants similar to the one under

App. Div.]

Second Department, June, 1917.

consideration rendered the title unmarketable. These are not precedents controlling the question involved in this case. One purchasing real property should not be subjected to the reasonable probability of being involved in a law suit over the meaning and force of a covenant. Uncertainty destroys marketability; but an injunction cannot be based on an uncertainty.

It was pressed upon us on the argument that the judgment rested on findings of fact that the stores were in some wise dangerous, noxious or offensive to the neighboring inhabitants, and that such finding rested securely on the evidence of such inhabitants, who surely knew what was dangerous, noxious or offensive to them. The argument fails to consider that the duty rests on the court, and not on the neighboring inhabitants, to interpret the meaning of these adjectives. Neither the evidence nor the findings of fact, other than those involving conclusions of law, support the conclusion that these stores violate the covenant, or are in any wise dangerous, noxious or offensive to the neighboring inhabitants within the meaning of these words properly defined according to their relation to the covenant as a whole.

The judgment is reversed, with costs; the 20th, 26th, 27th, 28th, 29th, 31st, 33d, 34th, 35th, 37th, 38th, the last sentence in the 46th, and the 49th findings of fact, and the 1st, 2d, 3d, 4th, 5th, 6th, 8th and 9th conclusions of law contained in the decision are reversed and disallowed; and the 18th, 32d, 33d, 34th, 37th and 38th findings of fact, and the 3d, 4th, 5th, 6th and 7th conclusions of law proposed by defendant are found, and judgment directed for the defendant dismissing the complaint on the merits, with costs.

JENKS, P. J., THOMAS, STAPLETON and RICH, JJ., concurred.

Judgment reversed, with costs; the 20th, 26th, 27th, 28th, 29th, 31st, 33d, 34th, 35th, 37th, 38th, the last sentence in the 46th, and the 49th findings of fact, and the 1st, 2d, 3d, 4th, 5th, 6th, 8th and 9th conclusions of law contained in the decision reversed and disallowed; and the 18th, 32d, 33d, 34th, 37th and 38th findings of fact, and the 3d, 4th, 5th, 6th and 7th conclusions of law proposed by defendant, found, and judgment directed for the defendant dismissing the complaint on the merits, with costs.

ADOLPH C. HOTTENROTH, Respondent, v. ROBERT K. MICKEY
and GENERAL AERONAUTIC COMPANY, Appellants.

Second Department, June 27, 1917.

Fraud — action for fraudulent misrepresentations inducing transfer of notes and stock — evidence — oral testimony to establish inducements leading up to agreement in writing.

Action to recover damages for alleged fraudulent misrepresentations inducing plaintiff to deliver to defendant certain notes and stock.

Held, that a verdict in favor of the plaintiff is against the weight of the evidence.

Oral testimony to show outside inducements leading up to an agreement in writing are subject to the infirmity that, in proportion to their relative importance, it is unlikely that matters of real moment would be suffered to remain in parol, especially where the beneficiary of such promises is an experienced attorney-at-law.

APPEAL by the defendants, Robert K. Mickey and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 16th day of November, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 8th day of December, 1916, denying defendants' motion for a new trial made upon the minutes.

Action to recover damages for alleged false and fraudulent misrepresentations by means of which plaintiff was induced to deliver to defendant certain notes and corporate stock.

Charles Hobby Bassford [*Louis F. Reed* with him on the brief], for the appellants.

Louis O. Van Doren [*Herrick McClenthen* with him on the brief], for the respondent.

S. P. Henshaw, for trustee in bankruptcy of General Aeronautic Company.

PER CURIAM:

On the disputed issue as to the preparation of the letter of January seventeenth (Exhibit B) and of January twenty-seventh (Exhibit C), it must be held that the plaintiff did

App. Div.]

Second Department, June, 1917.

join in dictating them. This leaves an important stock transaction carefully discussed, considered and formulated without putting down any of the promises and representations which plaintiff says were the moving inducements, and, if made, were of vital importance to him. Afterwards plaintiff sought to recapitulate such representations claimed to have been made in former conversations by the letter Exhibit D. Mr. Mickey's letter in reply (Exhibit E) was an instant denial and repudiation of all such alleged conditions or promises, with a request that plaintiff answer whether his interest could only be taken on the written terms of defendant's earlier letter and plaintiff's acceptance. Plaintiff then consummated the exchange, reaffirming his prior acceptance, saying: "My answer was and is unequivocally yes; my acceptance stands, and so do your promises and representations on which it was based." In this exchange of letters the representations thus attributed to Mr. Mickey are rejected at the first statement of their terms. Oral testimony to show outside inducements leading up to an agreement in writing are subject to the infirmity that in proportion to their relative importance it is unlikely that matters of real moment would be suffered to remain in parol. Especially does this consideration weigh where the beneficiary of such promises is an experienced attorney at law. In addition to the natural tendency to exaggerate and heighten verbal statements coming from a biased memory, we must regard the quick written denials made at the time. A verdict, as this was, necessarily based on such doubtful testimony, must be held to be against the decided weight of the evidence.

The judgment and order should, therefore, be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., THOMAS, STAPLETON, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

HELEN L. POLLITZER, Respondent, v. WILLIAM S. POLLITZER,
Appellant.

Second Department, June 27, 1917.

Husband and wife — separation — effect of former judgment of limited separation — findings necessary before entry of subsequent judgment for permanent separation.

Where, in an action for a separation from bed and board forever, the trial court finds as a matter of law that the plaintiff is entitled to a judgment of separation for a period of one year and that the parties or either of them may after the expiration of said period apply to the court to have such judgment made permanent, modified or discharged, the court, after the expiration of the judgment for one year, has no authority to enter a judgment permanently separating the parties, without permitting the presentation of new findings upon all of the evidence.

In such an action the power of the trial court is limited to dismissing the complaint, or granting a judgment for a separation from bed and board forever, or for a limited time, as the evidence may warrant.

After the judgment for one year entered in this case had been fully executed and had ceased to exist by its own limitation, the parties were left exactly where they were prior to its rendition and possess the same legal rights as to a separation from bed and board forever, that they possessed when the action was commenced.

In actions for separation the Code of Civil Procedure provides for the kind of judgment and gives no authority to the court to reserve any question or to modify or change the judgment entered, except to revoke the same as authorized by section 1767.

APPEAL by the defendant, William S. Pollitzer, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 6th day of March, 1917.

Wales F. Severance, for the appellant.

Julius Henry Cohen, for the respondent.

RICH, J.:

The defendant appeals from an order of the Special Term denying his motion to set aside a judgment of separation from bed and board for one year, entered herein on November

App. Div.]

Second Department, June, 1917.

5, 1915, and from what the appellant characterizes as a second judgment by which it was "Ordered, adjudged and decreed, that the said plaintiff and defendant be permanently separated from bed and board," and denying his request to be allowed to submit proposed findings upon which a new judgment should be entered in accordance with such findings. The motion was based upon the ground that the so-called second judgment was a final judgment, based in part upon additional evidence, without any additional findings of fact showing upon what facts the determination was based, the contention being that at the end of the year's separation decreed by the first judgment the parties came before the court and presented additional evidence tending to establish that the plaintiff was entitled to a separation from bed and board forever, and that findings of fact based upon the whole evidence should then have been made as a basis for the final judgment. This is a statutory action, and, as was held in *Ackerman v. Ackerman* (200 N. Y. 72, 76): "The courts of this State have no common-law jurisdiction over the subject of divorce, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute."

The provisions of the statute governing actions for a separation from bed and board are contained in sections 1762-1767 of the Code of Civil Procedure. Section 1762 provides that an action may be maintained "to procure a judgment, separating the parties from bed and board, forever, or for a limited time." Section 1767 provides that after a judgment of separation forever or for a limited period has been granted, upon satisfactory evidence of the reconciliation of the parties, the court may revoke the judgment, subject to such regulations and restrictions as the court sees fit to impose.

The complaint is not printed in the record, but it must be assumed that it is the ordinary complaint for a separation from bed and board forever. The issues formed by the service of the answer coming before the court for trial, and evidence being given of the facts constituting the alleged cause of action, the power of the trial court was limited to dismissing the complaint or granting a judgment for a separation from bed and board forever, or for a limited time, as the evidence established the rights of the parties to be. The evidence

taken upon the trial did not seem to satisfy the trial court of plaintiff's right to separation forever, for he found as a conclusion of law "That the said plaintiff is entitled to judgment against the defendant, that the said plaintiff and defendant be separated from bed and board for a term or period of one year from and after the 18th day of October, 1915, provided, however, that the parties or either of them, may after the expiration of said period of one year from and after said 18th day of October, 1915, apply to this court, to have such judgment made permanent, modified or discharged." Upon the entry of this judgment the power and authority of the court was exhausted, and there was nothing to make permanent, modify or discharge. The judgment was permanent for its full term of one year, had been fully executed and had ceased to exist by its own limitation, and the parties were left exactly where they were prior to its rendition and possessed the same legal rights as to a separation from bed and board forever that they possessed when the action was commenced. (*Murdock v. Murdock*, 148 App. Div. 564.) Had the judgment of separation from bed and board been forever, it might have been revoked at the end of the year, if the parties had in the meantime become reconciled, under the provisions of section 1767 of the Code, and the evident purpose and desire of the trial court thus accomplished without presenting the awkward situation now existing. At the expiration of the year, no reconciliation having been effected in the meantime, the plaintiff could have commenced a new action for a separation from bed and board forever upon the same facts involved in the action in which the year's separation was decreed (*Murdock v. Murdock*, *supra*), or the parties could have voluntarily appeared and agreed that such action should be regarded as still pending, and that the evidence taken therein should be treated as having been given in such new action, but new findings would be necessary before the entry of judgment. The same results would follow if we were to adopt the proposition contended for by the respondent, and regard the action as still pending and the evidence given therein as before the court. (Code Civ. Proc. § 1022.) The respondent contends that no new evidence was given, but this contention must be overruled, the judgment twice declar-

ing to the contrary. She contends also that the decision last entered is not a judgment, but an order. Its language shows that this contention is without merit, but, treating it as an order modifying the former judgment, we have an order which it was not within the power of the court to make, as the judgment had by its own terms ceased to exist. The authorities cited by the respondent are not in point and have no controlling application to the facts presented by this record. They all deal with the subject of alimony, and are nearly all actions for an absolute divorce, in which such questions may be reserved or in which the judgment may provide for a later application to modify or change, under the statutory provisions applicable to that class of actions; but in actions for separation the Code provides the kind of judgment that may be entered, and gives no authority to the court to reserve any question or to modify or change the judgment entered, except to revoke the same as authorized by section 1767. It is said in the opinion of the learned court at Special Term that if the first judgment was wrong for any reason arising from an error in determining the facts or law applicable thereto, or as an unauthorized reservation of power to modify, the judgment should have been reviewed by appeal. I do not concur in this opinion. The appellant seems to have been satisfied with the adjudicated separation for one year, but he now faces an entirely different situation, without any findings of fact advising him upon what additional facts the trial court relied in granting a judgment of separation from bed and board forever; he is deprived of the right to review upon the merits unless such right is secured to him through granting the relief he seeks, viz., vacating both judgments and authorizing him to file requests to find, to be considered and acted upon; and requiring new findings embracing all of the evidence and the entry thereafter of such judgment as the trial court may regard proper and warranted. The sole question before the trial court will be whether, upon all of the evidence, a judgment of separation from bed and board forever is justified and advisable, and then, if the defendant is not satisfied, he can obtain a review upon appeal.

The order must be reversed, and the defendant's motion,

in so far as it relates to the judgment of January 2, 1917, granted, without costs.

JENKS, P. J., THOMAS, STAPLETON and MILLS, JJ., concurred.

Order reversed and defendant's motion, in so far as it relates to the judgment of January 2, 1917, granted, without costs.

JOSEPH H. DOUD, Appellant, *v.* THE HUNTINGTON HEBREW CONGREGATION OF HUNTINGTON, N. Y., Respondent.

Second Department, June 27, 1917.

Tax — constitutional law — sale of land of one person to satisfy debt of another void — limitation of action of ejectment to recover possession of lands conveyed under void tax sale — Tax Law, section 132, construed.

A sale of the land of one person to satisfy a tax assessed against another is void and cannot be validated by a legislative act.

The limitation of actions for the cancellation of a void tax sale under section 132 of the Tax Law, is applicable to an action of ejectment, and the statute begins to run when the tax deed is recorded or the holder of the tax title enters into actual possession.

A tax sale void because violating constitutional limitations cannot be made good by a curative act of the Legislature, but a statute of limitations makes a good defense to one holding under a tax deed when the tax sale was utterly void for jurisdictional defects on constitutional grounds.

APPEAL by the plaintiff, Joseph H. Doud, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Suffolk on the 18th day of January, 1917, upon the decision of the court dismissing the complaint on the merits after a trial before the court without a jury.

Thomas Young [George T. Walker with him on the brief], for the appellant.

S. LeRoy Ackerly, for the respondent.

BLACKMAR, J.:

The judgment might have been affirmed upon the opinion of the learned justice who tried the case, except that the

appellant urges upon us a point which apparently was not presented to the court at Trial Term.

The point on which the present appeal is rested is that the tax of 1901, for non-payment of which the land was sold to defendant's grantor, was, under the law as it then existed, assessed against the person and not the land; that the assessment was against Eunice Baker; that the land of Emma Baker was sold to satisfy the debt of Eunice Baker, in violation of her constitutional rights, and that such sale cannot be validated by any subsequent legislative enactment.

With these propositions of law we concur. The assessment was against the person and not against the land. (*Hagner v. Hall*, 10 App. Div. 581; *affd.*, 159 N. Y. 552.) The sale was void for jurisdictional defect, and no legislative fiat can validate the sale of the land of Emma Baker to satisfy the debt of Eunice Baker. (*People ex rel. Boenig v. Hegeman*, 220 N. Y. 118.)

But although no act of the Legislature can validate the sale, it is competent for the Legislature to pass a statute limiting the time within which plaintiff may maintain an action attacking such sale. "Such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." (*Meigs v. Roberts*, 162 N. Y. 371, 378. See, also, *Peterson v. Martino*, 210 N. Y. 412; *Bryan v. McGurk*, 200 id. 332; *People v. Ladew*, 189 id. 355.)

Such a Statute of Limitations is found in section 132 of chapter 908 of the Laws of 1896 (Gen. Laws, chap. 24), known as the Tax Law. This law, being a codification of other statutes, added thereto a provision in effect that all such conveyances and tax sales on which they are based shall be subject to cancellation by reason of the payment of such taxes or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the Comptroller, or in an action brought before a competent court therefor. Then follows a provision that constitutes a Statute of Limitations, as follows: "provided, however, that such application shall be made, or such action brought, in the

case of all sales held prior to the year eighteen hundred and ninety-five, within one year from the passage of this act; and in the case of the sale of eighteen hundred and ninety-five and of all sales hereafter held, that such application shall be made, or such action brought, within five years from the expiration of the period allowed by law for the redemption of lands sold at the particular sale sought to be cancelled." (See, also, Tax Law [Consol. Laws, chap. 60; Laws of 1909, chap. 62], § 132.)

The relevant parts of these last cited enactments are, *first*, that a ground of relief is a defect in the proceedings affecting the jurisdiction on constitutional grounds, and *second*, that the action authorized thereby must be brought within five years from the expiration of the period allowed by law for redemption.

The plaintiff's cause of action was barred by the statute, which was duly pleaded in the answer. In *Bryan v. McGurk* (200 N. Y. 332) the Court of Appeals decided that such limitation was applicable to an action of ejectment, such as the one we are considering; and that the statute begins to run when the tax deed is recorded or the holder of the tax title enters into actual possession. The tax deed in this case was recorded in 1904; the defendant went into possession thereunder in 1907, and the action was begun in 1913. It is, therefore, barred by the statute.

The decision does not trench on the principle relied on by plaintiff, that a tax sale, void because violating constitutional limitations, cannot be made good by a curative act. The principle is sound and must be preserved, but a Statute of Limitations may be a good defense to one holding under a tax deed when the tax sale was utterly void for jurisdictional defects on constitutional grounds. The distinction is settled by abundant authority, and is in accord with elementary principles of constitutional law.

The judgment should be affirmed, with costs.

JENKS, P. J., THOMAS, STAPLETON and PUTNAM, JJ., concurred.

Judgment affirmed, with costs.

App. Div.]

Second Department, March, 1917.

In the Matter of the Judicial Settlement of the Account of ALEXANDER F. VOIGHT and MARTIN RUST, as Administrators with the Will Annexed of the Estate of ANDREW RUST, Deceased.

BROOKLYN TRUST COMPANY, as Committee of the Property of ELLA V. SCHROETER, an Incompetent Person, and RICHARD M. CAHOONE, as Special Guardian for CHARLOTTE R. THOMAS, an Infant, Appellants; ALEXANDER F. VOIGHT and MARTIN RUST, as Administrators with the Will Annexed, and Others, Respondents.

Second Department, March 30, 1917.

Will construed — when payment to descendants per capita and not per stirpes — rules of construction — use of words "lawful descendants" and "issue."

A testator devised the proceeds of certain property in trust for the benefit of his daughter during her life and provided that at her death the principal should be paid "to her lawful descendants." Provisions of the will examined, and held, that it was the intention of the testator from the use of the words "lawful descendants" that payment should be made to such descendants *per capita* and not *per stirpes*, although in subsequent portions of the will he provided that the "children" and "issue" of certain persons were to take *per stirpes*;

That a child conceived before the death of the person upon whose life the remainder was limited and born thereafter was entitled to share in such funds.

If in one part of a will a given word or phrase is so restricted or expanded by accompanying explanation that the word or phrase is endued by the testator with a secondary meaning, however eccentric, the same word or phrase when again found in the same instrument may be given the same meaning; but identity of the word requiring construction with the like word elsewhere in the instrument is essential to the application of this doctrine.

When having once used for his testamentary purpose his own conception of the word "issue," the testator rejects that word in a later portion of the will, he at least suggests the possibility that in refusing the word once used and laying hold of another, he intended not merely a departure in expression, but a change in purpose, which was substantial.

APPEAL by Brooklyn Trust Company as committee, and another, from parts of a decree of the Surrogate's Court of

the county of Kings, entered in the office of said Surrogate's Court on the 26th day of May, 1916, settling the accounts herein and directing distribution of the estate.

Francis L. Archer, for the appellant trust company.

Richards Mott Cahoone, special guardian, appellant in person.

Moses J. Stroock [*Frank I. Schechter* with him on the brief], for the respondents Alexander F. Voight and another, as administrators, etc.

Franklin A. Rogers, for the respondent Theresa M. H. Halstead.

Patrick E. Callahan, special guardian, for the respondents John C. Halstead and another.

Hugo H. Ritterbusch, for the respondent John Andrew Rust.

Decree of the Surrogate's Court of Kings county affirmed upon the opinion of the surrogate, with costs to the respondents, administrators c. t. a., payable out of the fund payable to the descendants of Anna Marguerita Voight; with costs to the special guardian, payable out of the fund of their respective wards; and with costs to the committee, payable out of the fund of its incompetent person.

JENKS, P. J., THOMAS, STAPLETON and PUTNAM, JJ., concurred; CARR, J., not voting.

The following is the opinion of the surrogate:

KETCHAM, S.:

The 5th paragraph of the will under which this accounting is made devises certain real estate in trust to pay the net income thereof to the testator's son therein named during his life, and upon his death to sell the premises, and as to one-half of the net proceeds of said sale "to invest and keep invested the same, and to pay the annual income thereof to my said daughter Anna Marguerita Voight during her life, and at her death to pay the principal thereof to her lawful

App. Div.]

Second Department, March, 1917.

descendants." The language quoted is the only portion of the will which requires construction. The daughter, Anna Marguerita Voight, died before the death of the life beneficiary first named, and at the death of such first life beneficiary the lawful descendants of such daughter were Alexander F. Voight, son; Theresa M. H. Halstead, daughter; Ella V. Schroeter, daughter; Charlotte R. Thomas, granddaughter, a child of deceased daughter; Mignonne C. Pelz, granddaughter, a child of Alexander F. Voight; John C. Halstead, grandson, a child of Theresa M. H. Halstead; Melville Schroeter, grandson, a child of Ella V. Schroeter, and an unborn child of the said Theresa M. H. Halstead, which child was subsequently born alive, and is now known as Chester A. Halstead. One-half of the proceeds mentioned in the passage of the will last specifically quoted is now payable to the lawful descendants of Anna Marguerita Voight, deceased. The question is whether payment shall be to such descendants *per capita* or *per stirpes*. Under a capital division eight persons — being children to the number of three, children of living children to the number of four, and a child of a deceased child — will take in equal rank and portion. Under a stirpital division each of the three children who survived the testator will take one share, and the child of a deceased child who has died since the testator's death will take one share by representation. It is aptly said in the brief of counsel for the trust company, as committee, that there has perhaps never come before this court a will in which there have been used all the troublesome words "children," "issue," "issue of her body," "heirs" and "descendants." In the 4th paragraph these provisions are found: There is a gift in remainder unto "the children" of the daughter, Anna Marguerita, who shall survive her. It is also provided that should any of her "children die before her * * * leaving issue who shall survive her, * * * then such issue are to receive the portion to which their parent would have been entitled if living." It is therein provided that if the said daughter "shall die leaving no such issue of her body her surviving" the gift shall be "unto the children of my son John C. Rust," or, if he be without issue at the time of the daughter's decease,

"to him, his heirs and assigns forever." In the 5th paragraph there is a gift of a remainder upon the death of the son, John, upon his "leaving issue him surviving," to "such issue and to their heirs and assigns forever." It is then provided that if the said son, John, "shall die leaving no such issue him surviving," then the subject of the trust is to be sold, and one-half of the proceeds is to be divided among five named nephews. As to the disposition to these nephews the following is the language of the will: "If at the time of such division any one of my said nephews shall be dead, then his issue, if any, shall take the same share their parent would have taken if living; but if he shall leave no issue him surviving, then such one-half of the proceeds shall be divided among the survivors of said five above-named nephews." By the 8th paragraph of the will the residuary estate is given in trust to pay one-half of the income to the son, John, and the other one-half to the daughter, Anna Marguerita, and the paragraph last named proceeds as follows: "Whenever either of my said children shall die leaving issue them surviving, my executors shall pay over and divide among such issue the one-half part of such balance of my residuary estate, and so likewise do upon the death of the other of my said children; should any of my children die without issue, and the issue of the other child survives them, then I give to such surviving issue the whole of the balance of my residuary estate *per capita*; but should both my said children die leaving no issue them surviving, then the rest, residue and remainder of my estate shall be divided equally among and between my following named nephews [here follow names]. If at the time of such division any one of my said nephews shall be dead, then his issue, if any, shall take the same share their parent would have taken if living; but if he shall leave no issue him surviving, then such one-half of the proceeds shall be divided among the survivors of said five above-named nephews." In the language first quoted at the head of this opinion the words "lawful descendants" must receive their normal meaning under which the division will be directed unless the contrary intent appears, however faintly, in the context of the will. It is sought to discover such contrary intent by the same process which was followed in *Matter of Farmers'*

App. Div.]

Second Department, March, 1917.

Loan & Trust Company (213 N. Y. 168). There the word "issue" in the portion of the will which required construction was given a stirpital meaning, because the same word in other portions of the instrument was used with the obvious purpose to produce such meaning. In the case cited the opinion of the court, by Judge CARDOZO, repeatedly indicates that the only method there employed, and the only rule there announced, were limited to a comparison of separate portions of a will containing the identical word. Doubtless the case cited teaches that if in one part of a will a given word or phrase is so restricted or expanded by accompanying explanation that the word or phrase is endued by the testator with a secondary meaning, however eccentric, the same word or phrase when again found in the same instrument may be given the same meaning. But identity of the word requiring construction with the like word elsewhere in the instrument is essential to the application of the doctrine. The case cited contains no warrant for infusing the phrase "lawful descendants" when used *simpliciter* with a meaning which in the same instrument is put upon the word "issue" by its context. Hence, if the word "issue" or the word "descendants" has gained a specific value in one part of the will, the same word recurring in another part may well be of the same value; but where one of these words has been employed with a significance which is contributed wholly by its context, and in another part of the will another word is selected, without the reproduction of the qualifying expression, the reason of the rule apparent in the case cited vanishes. When, having once used for his testamentary purpose his own conception of the word "issue," the testator rejects that word in a later portion of his will, he at least suggests the possibility that in refusing the word once used and laying hold of another, he intended not merely a departure in expression, which would have been utterly idle, but a change in purpose, which was substantial. Where the word secondarily adopted is used without the modifying language, which alone transplanted the earlier word from its essential meaning, there is added evidence of a change of intent. This argument would seem to leave the words "lawful descendants" in their primary meaning, even though elsewhere in the will there were

many and repeated instances of the use of the word "issue" in such relation only as to produce a direction for a stirpital division. But it would not be extravagant to say that the more frequently and resolutely the testator had used the word "issue" with a stirpital intent the more abrupt and significant would be his employment of the phrase "lawful descendants" in a single contrast with his general purpose. But, as suggested *supra*, in the 4th paragraph of the will the gift to "issue" is of the portion to which the parent would have been entitled. In the 5th paragraph the gift to "issue" is to such issue without definition of the method of distribution. Again, in the case of the death of a nephew, the gift to "issue" is of the share of the parent. In the 8th paragraph the word "issue" is once used without qualification; is again used to effect a gift to issue *per capita*, and finally, in such fashion as to work a gift to issue only of the share which the parent of such issue would have taken if living. It seems imperative to assign to the term "lawful descendants" its intrinsic meaning in a case where, if it were sought to give it color from the use of the word "issue," the latter would be found to have been used with varying significance. The conclusion is that by the words "lawful descendants" in the language quoted *supra* from the 5th paragraph of the will it was intended that upon the death of the daughter, Anna Marguerita, the fund therein involved was to be paid equally to her descendants *per capita*. Among the persons entitled to a share of such fund is the child conceived before the death of the person upon whose life the remainder was limited and born thereafter. (*Kane v. Odell*, N. Y. L. J. March 13, 1916; *Matter of Farmers' Loan & Trust Co.*, 82 Misc. Rep. 330, 336; *Cooper v. Heatherton*, 65 App. Div. 561; *Marsellis v. Thalhimer*, 2 Paige, 35, 39, 40; *Jenkins v. Freyer*, 4 id. 47, 53; *Hone v. Van Schaick*, 3 Barb. Ch. 488, 508, 509.) The decree will conform to these views.

App. Div.]

First Department, July, 1917.

In the Matter of MOSES C. ABUZA, an Attorney, Respondent.

First Department, July 18, 1917.

Attorney-at-law disbarred — aiding judgment debtor to conceal property.

Attorney-at-law disbarred for participating in an attempt of his client, a judgment debtor, to conceal from the creditor on an examination in supplementary proceedings property belonging to the judgment debtor by taking and keeping it in his possession during the examination, by allowing his client to testify falsely without objection or protest and by claiming privilege when interrogated under oath concerning the transaction.

DISCIPLINARY PROCEEDING instituted by the Association of the Bar of the City of New York.

Einar Chrystie, for the petitioner.

Moses C. Abuza, respondent in person.

CLARKE, P. J.:

Respondent was admitted to the bar in October, 1912, by the Appellate Division, First Department, and was practicing in the First Judicial District at the time of the occurrences in question. He was the attorney for one Ettinger against whom a judgment had been obtained in the case of *Lincoln v. Ettinger*. On April 7, 1916, the judgment debtor appeared in the City Court in compliance with an order directing his examination in proceedings supplementary to execution. At the time the oath was administered the judgment debtor wore a stick-pin, ring and a watch and chain. After being sworn and before being examined he requested the attorney for the judgment creditor to delay the examination until the arrival of his attorney, the respondent, which was granted. The respondent shortly thereafter reached the court room and had a conference with the judgment debtor who handed him his watch and chain and concealed the pin and ring upon his own person. The examination of the judgment debtor thereafter proceeded and in the course thereof testified as follows: " Q. Have you any jewelry? A. No, sir. Q. What became of the chain you had on your vest at the time you were sworn this morning? A. I had no

chain on my vest, I am sure of that. I know that I am under oath. Q. Did you ever own a watch and chain? A. I can show you a pawn ticket for one * * *. Q. What became of the ring you had on your finger at the time you were sworn? A. I had no ring on my finger, I am sure of that."

These answers were given by the judgment debtor in the immediate presence of the respondent who sat a few feet from him. Thereafter the judgment debtor was brought before the justice presiding at Special Term and in the presence of the respondent the attorney for the judgment creditor informed the court what had taken place. The judgment debtor was thereupon put upon the stand and having been sworn by the justice, he denied under oath that he had any of these articles in his possession at the time of his arrival at the court house. The respondent was then put upon the stand and sworn and the justice inquired of him as to whether he had observed these jewelry articles on the person of his client. He claimed that that was a privileged communication. The justice overruled the objection, holding that it was not privileged as the fact inquired of was observable and not confidential. The respondent then produced the watch and chain from his pocket and the judgment debtor the other articles of jewelry. The justice said that he would report the proceedings to the grievance committee of the Bar Association with respect to the respondent's conduct, which was thereafter done.

It appears, therefore, that respondent heard his client twice testify falsely without objection or protest and participated in an attempt to conceal from the creditor property belonging to the judgment debtor by taking and keeping it in his possession while it was being inquired about in a judicial proceeding and by claiming privilege when interrogated under oath concerning the same. It is obvious that the conclusion of the learned official referee that the respondent was guilty of unprofessional conduct is correct and must be approved.

We are of the opinion that the respondent should be and hereby is disbarred.

LAUGHLIN, SMITH, PAGE and SHEARN, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

App. Div.]

First Department, July, 1917.

In the Matter of LOUIS MATHOT, an Attorney, Respondent.

First Department, July 18, 1917.

Attorney-at-law disbarred — permitting client to verify petition containing false statements.

Attorney-at-law disbarred for permitting his client, the plaintiff in an action for divorce, to verify a petition containing a material false statement to the effect that she had established a *bona fide* residence in the State of New Jersey and in procuring the same to be filed in the office of the clerk of the court in said State.

DISCIPLINARY PROCEEDING instituted by the Association of the Bar of the City of New York.

Einar Chrystie [*John Neville Boyle* of counsel], for the petitioner.

Byrnes & Feibel, attorneys for the respondent.

CLARKE, P. J.:

Respondent was admitted to the bar in September, 1879, at a General Term of the Supreme Court held in Kings county, and has been and is now practicing in the First Judicial District.

Mrs. Lucie L. Geissler wished to procure a divorce from her husband and learning the name, occupation and address of the respondent through an advertisement in a French newspaper published in New York wrote him on the subject. The respondent first met Mrs. Geissler in November, 1913. It appeared that desertion was the only ground that could be urged as a basis of divorce. The respondent advised the bringing of an action in the State of New Jersey and told Mrs. Geissler that she would have to be an actual *bona fide* resident of New Jersey at the time the action was brought. He further explained to her that desertion was not ground for divorce in the State of New York, but that he thought she could get the divorce in the State of New Jersey on that ground and he would recommend to her an attorney by the name of William H. Galloway, a New Jersey attorney, because he was not familiar with the laws of New Jersey and could not personally prosecute an action in that State. At this time the respondent knew that Mrs. Geissler was working and

residing in the city of New York. Respondent had some acquaintance with a Mrs. Coulon residing at Bayonne, N. J., and he accompanied Mrs. Geissler to the residence of Mrs. Coulon at Bayonne and made the parties acquainted and told Mrs. Coulon that Mrs. Geissler desired to have a room in Mrs. Coulon's house and stated further that it was the intention of Mrs. Geissler to commence an action for divorce against her husband and that she wished to establish her residence in New Jersey. Mrs. Geissler arranged with Mrs. Coulon for a room at three dollars per week and moved her trunk containing some worthless articles to her house. Mrs. Geissler never actually occupied the room but continued to reside and carry on her work in the city of New York. Mr. Galloway prepared the petition to the Chancery Court of New Jersey and gave a draft thereof in his own handwriting to the respondent. It was typewritten by some one in respondent's office and the respondent thereupon, on February 5, 1914, sent for Mrs. Geissler and on her arrival called in his son, handed the petition to him and sent him with Mrs. Geissler to New Jersey to verify it before a master in chancery and on that day it was duly sworn to by Mrs. Geissler, returned to the office of the respondent and filed in the office of the clerk in chancery on February 13, 1914. The 3d paragraph of the petition is as follows:

"3. Your petitioner is a *bona fide* resident of the State, having her permanent home at Number 72 West 33rd Street, Bayonne, in the County of Hudson, and State of New Jersey; that for more than two years next preceding the filing of this petition, petitioner has been continuously a resident of the County of Hudson, and has ever since been and still is a resident of said County as hereinbefore stated."

On or about March 23, 1915, Advisory Master Biddle sent to Mr. Galloway a memorandum in the Geissler action which states: "The third paragraph of the petition does not answer the necessities of the case. * * * That the wife had been a *bona fide* resident of this State for more than two years next preceding the filing of this petition (Feb. 13, 1914) may or may not be sufficient."

Mr. Galloway brought this memorandum to the attention of the respondent and stated that he thought it would be

App. Div.]

First Department, July, 1917.

necessary to amend the petition for divorce, setting forth when Mrs. Geissler became a resident of the State, and suggested that respondent ascertain from Mrs. Geissler the exact facts. A few days later Mr. Galloway received from respondent an original memorandum in the handwriting of the respondent as follows:

" In the year 1909 he left for France and never called upon nor wrote to her, he is now as she believes in France, but does not know where; he never sent her any money nor inquired about his child, a girl of 8 years, born in 1906. She supported herself and child through her own work, the name of the child Lucie Marie Geissler, born in France, visiting teacher.

" Residence in Bayonne since 1910.

" She trav. at time either in France or in the U. S., but always retained her residence at Bayonne, N. J."

Later Mr. Galloway declined to proceed with the case for the reason that Mrs. Geissler had not been a resident of the State of New Jersey for two years prior to the filing of the petition.

The learned referee has reported that the foregoing facts are undisputed. He further says: " The precise misconduct of which the respondent stands accused is the procuring or causing Mrs. Geissler to verify a petition containing an allegation which he knew to be false.

" That Mrs. Geissler swore to the truth of this allegation and that it is false is not denied. There is no testimony tending to show that Mrs. Geissler ever attempted to procure a residence in New Jersey earlier than December, 1913, and such testimony as there is, if given full weight, falls far short of establishing an actual and *bona fide* residence there even at that time.

" The respondent admits that he knew a residence in New Jersey was required but denies that he knew that under the laws of New Jersey a two years' residence was necessary before the filing of a petition for divorce. His defense is that he put Mrs. Geissler's case in the hands of Mr. Galloway, and relied upon him entirely in all matters connected with the prosecution of the action, and that it was not until Mr. Galloway refused to go on because Mrs. Geissler had not been a resident of the State of New Jersey for two years prior to the filing of the petition that he first became aware of such a rule and fixed the date in the Spring of 1915, about

the time the Advisory Master informed Mr. Galloway the petition would have to be amended."

Mr. Galloway testified that respondent first spoke to him about the proposed divorce proceedings of Mrs. Geissler in January or February of 1914; that he did not see Mrs. Geissler until a month or so after the petition for divorce was filed; that a few days after the first conversation with respondent he had a second interview with him at which time he left with him a copy of the chancery rules of New Jersey and read to respondent from a copy he had with him the statutes of New Jersey relating to divorce. That at this second interview he asked respondent where the client lived to which the respondent replied that she lived in Bayonne; that he then told the respondent that it would be necessary, under the statute, for his client to have been a *bona fide* resident of New Jersey for two years next preceding the filing of the petition, and that that was a statutory requirement, and would have to be set forth in the petition; and that respondent prepared a memorandum of the facts, from which he prepared the form of petition.

It should be borne in mind that Mrs. Geissler was the respondent's client. She retained him and paid him his fee. He was not the attorney of record for he was not a New Jersey practitioner. He engaged Galloway to do the attorney work in New Jersey upon a division of the fee. Galloway had but one interview with Mrs. Geissler and this a month or so after the petition was filed. He knew nothing of her antecedents or of the facts in the case except as presented to him by the respondent. Mrs. Geissler, testified: "Mr. Mathot was my lawyer. I had meant to leave the whole matter to him. I did whatever Mr. Mathot advised. Mr. Mathot said I would only have to pay for my room until I would get my decree which would be at the end of April, 1914. He said: 'I will hand you your decree for your next birthday which is in April, you will be a free woman then and you will not have to give me any more money — you will give me \$50 more then when I hand you the decree.' This was a conversation we had on the train coming back from Bayonne." She further testified: "I never resided in New Jersey, I never said to Mr. Mathot that I had lived there."

App. Div.]

First Department, July, 1917.

The referee states: "On the question of the respondent's knowledge of the two years' requirement and the information imparted by him to Mr. Galloway concerning Mrs. Geissler's residence the contents of petitioner's exhibit 18, above set forth, is significant. The respondent in his own handwriting states that Mrs. Geissler resided in Bayonne since 1910, and although she travelled 'always retained her residence at Bayonne, N. J.'" The referee further said: "On the question of the respondent's knowledge of the allegation in the petition that the petitioner was a *bona fide* resident of the State of New Jersey, had a permanent home there and had been continuously a resident of the County of Hudson where she had resided for more than two years next preceding the filing of the petition, attention is called to the undisputed facts, as above stated, to the effect that the petition was typewritten in the respondent's office, that the respondent sent his son with Mrs. Geissler to New Jersey to have it verified, that it was returned to the respondent's office and remained there for some days before it was filed in New Jersey. The irresistible inference seems to be when these facts are considered, coupled with all the other testimony, that the respondent must have had knowledge of this important feature of the petition." And he concludes: "After a careful consideration of all the testimony, I reach the conclusion that it must be held that the respondent was cognizant of the provision requiring a two years' residence in New Jersey before Mrs. Geissler could maintain her action for a divorce; that he knew the contents of the petition in the action; that the allegation as to the petitioner's residence was untrue, and that he was instrumental in her making oath thereto."

"I find the charge against the respondent of misconduct as an attorney at law sustained."

We have very carefully considered all of the evidence in the case and are satisfied that the conclusion of the learned official referee is fully justified and we approve the same. The respondent is an attorney of very many years practice at the bar and according to his own testimony has had many divorce cases. He admits that he knew that Mrs. Geissler was a resident of New York and that she would have to be an actual *bona fide* resident of New Jersey at the time she

brought her divorce action. There is no doubt from his testimony, as well as that of Mrs. Geissler, that in introducing her to Mrs. Coulon for the purpose of acquiring a nominal residence at Bayonne he was assisting Mrs. Geissler and in fact directing her to establish a residence in New Jersey which was neither actual nor *bona fide*. In other words, establishing for her a residence for divorce purposes solely in New Jersey, and there is no escape from the conclusion that he knowingly permitted her to verify a petition containing a material false statement and procured it to be filed in the office of the clerk of the Court of Chancery in New Jersey. His attempt to shift the responsibility to Mr. Galloway cannot succeed because it is clearly proved that whatever information Mr. Galloway had was derived from the respondent who alone devised the scheme of the purported New Jersey residence and authorized commencement of the action in that State based thereon.

It is our opinion that for the professional misconduct of which he had been found guilty the respondent should be and hereby is disbarred.

SCOTT, PAGE, DAVIS and SHEARN, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

EVERETT L. CRAWFORD and S. CLINTON SHERWOOD, as Trustees under the Last Will and Testament of HENRY DEXTER, Deceased, Respondents, v. CLARISSA TREADWELL DEXTER and Others, Appellants, Impleaded with the SALVATION ARMY and Others, Respondents.

First Department, July 18, 1917.

Will construed — trust for benefit of incompetent — disposition of accumulated income — gift of entire income subject to payment of specific bequests.

A testator created a trust for the benefit of his incompetent daughter who was his only heir at law. Provisions of the will examined, and *held*, that a gift was created to the daughter of the entire income from the trust fund, subject to the payment of certain specific bequests;

App. Div.]

First Department, July, 1917.

That the trustees are administrators of the income and not disposers thereof, and have no power to use the same to increase the shares of the residuary legatees;

That their discretion is limited to determining how much of the income shall be expended for the benefit of the daughter during her incompetence, and that they are made custodians of the balance;

That there was no direction for an illegal accumulation of income.

APPEAL by the defendants, Clarissa Treadwell Dexter and others, from parts of a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of New York on the 6th day of July, 1916, upon the report of a referee appointed to hear and determine the issues.

William Mason Smith, for the appellants Mary G. Dexter and others.

Albert W. Putnam [*George Roberts* with him on the brief], for the appellant S. Clinton Sherwood.

Robert Grier Monroe [*Lee McCanliss* with him on the brief], for the appellant Clarissa T. Dexter.

Walter E. Hope [*Sinclair Hamilton* with him on the brief], for the plaintiffs, respondents.

Grenville T. Emmet [*Allan S. Locke* and *Robert Thorne* with him on the brief], for defendants Midnight Mission and others, respondents.

William C. Beecher, for the New York Society for the Suppression of Vice, respondent.

Charles H. Beckett [*Madison H. Ferris* with him on the brief], for the Salvation Army, respondent.

Francis Smyth, for the New York Association for Improving the Condition of the Poor, respondent.

W. H. Van Steenbergh, for American Tract Society, respondent.

Fancher Nicoll, for the American Bible Society, respondent.

George N. Whittlesey [*Stanley W. Dexter* with him on the brief], for the Children's Aid Society, respondent.

Herbert S. Schoonmaker, for Young Men's Christian Association, respondent.

DOWLING, J.:

Henry Dexter died on July 11, 1910, leaving a last will and testament executed October 6, 1906, and eight codicils thereto, all of which were duly admitted to probate by the Surrogate's Court of New York county. He left him surviving as sole heir at law his daughter, Clarissa Treadwell Dexter, who has been continually of unsound mind for many years and who was confined in Bloomingdale Asylum as early as 1883, remaining there until 1894, since which time for the greater part of the period she has been residing and cared for in her father's home, and since his death in the family home. Her disease is incurable, although she has never been judicially declared incompetent nor has any committee of her person or property been appointed. Decedent's estate at the time of his death was valued at \$1,400,797.90. By his will a trust was created under the 4th paragraph thereof, which is the source of the controversy between the parties hereto and which reads as follows:

"*Fourth.* I give, devise and bequeath all the rest, residue and remainder of my property and estate, real, personal and mixed, wheresoever and whatsoever, which I may own, or be in any wise entitled to at the time of my decease; unto my executors hereinafter named, or such of them as shall take upon themselves the execution of this my Will, and the survivors and survivor of them, IN TRUST, for the following uses and purposes:

"1. To pay and discharge all transfer or succession taxes upon all the bequests and devises contained in this my Will, so that no legacy or devise specifically given therein may suffer diminution by reason of such taxes; but such taxes shall be paid out of the residue of my estate.

"2. To apply the interest or income of the said rest, residue and remainder of my property and estate (after payment of such taxes), or so much thereof as may be necessary in their best judgment and discretion, but not less than Five

thousand dollars per annum, to the care, support, maintenance, benefit and use of my daughter Clarissa Treadwell Dexter, for and during her natural life, such care, support, maintenance, benefit and use to include all proper attendance, such as she is now receiving, and also such additional care, support, maintenance, benefit and use as shall thereafter become necessary or proper for her health, well being, comfort and happiness.

" 3. If at any time my said daughter shall recover her mental and physical health, so as in the opinion of my executors, or those taking upon themselves the execution of my Will, or the survivors or survivor of them, to render it proper and safe to do so, then I hereby authorize them to pay over to my said daughter, the whole of the interest and income of said rest, residue and remainder of my said property and estate not theretofore disposed of by them in payment of legacies under the power and authority hereinafter given to them.

" 4. It is my desire that my present residence Number 42 West Fifty-sixth Street in the Borough of Manhattan, City of New York, shall be maintained for my daughter's occupancy during her life, and that she shall be surrounded with everything which shall make for her comfort and pleasure, the number in service in the home being maintained as I would have it if living and as befitting one in her station in life. Her every wish shall be respected — with regard to her pleasure and whether she shall remain at home or travel, etc.— when in the judgment of the majority of my executors it shall not seem unwise so to do.

" 5. At the end of each year of their trusteeship, whatever funds may remain of the income of my estate, after the payment of all bills for the proper maintenance of my daughter, my executors shall have the power and it is my desire that out of the remaining income they may pay the pecuniary legacies bequeathed herein to individual legatees in whole or in part *pro rata*, until such legacies shall be wholly paid; and when such legacies to individuals shall have been wholly paid, my executors shall in like manner out of said remaining income pay *pro rata* on account of the pecuniary legacies to corporations bequeathed herein (other than gifts of the residue

of my estate) until such legacies to corporations shall be fully paid; unless in any year it should in the judgment of my executors seem unwise to do so, keeping in mind always the sufficiency of my daughter's income. And I also authorize my executors at any time during my daughter's lifetime if they shall deem it proper and safe to do so, to transfer to the Protestant Episcopal Mission in Mexico, the shares of the capital stock of the Woodlawn Cemetery bequeathed to them herein; but in no other respect shall my executors pay over or distribute the principal of said trust fund during the lifetime of my said daughter, than to transfer said shares of stock of the Woodlawn Cemetery as above indicated.

"6. My executors and trustees are authorized to retain the securities in which my estate shall be invested at the time of my decease and they need only change such investments when in their judgment it shall make for the better security of my daughter's income."

By the 5th paragraph of his will the testator provided: "After the decease of my daughter Clarissa Treadwell Dexter, I hereby direct my executors to dispose of the said rest, residue and remainder of my property and estate in manner following: * * *" Then followed directions for the payment and transfer of twenty-five shares of the capital stock of the Woodlawn Cemetery to the Protestant Episcopal Mission in Mexico, and to certain individuals pecuniary bequests aggregating \$39,000, and to three corporations pecuniary bequests aggregating \$1,200. Then by the 7th paragraph of his will testator directed:

"*Seventh.* All of the trust fund constituted by the Fourth Paragraph of this my Will, that shall remain undistributed by my executors at the decease of my said daughter after payment in full, whether before or after her decease, of all the legacies directed to be paid in the Fifth Paragraph of this my Will, I hereby direct my executors, or the ones taking upon them the execution of this my Will, or the survivors or survivor of them, to distribute as follows, that is to say; my executors shall pay to the following legatees the sums of money which I give and bequeath to them respectively, to wit:"

Then follow bequests to certain charitable organizations

App. Div.]

First Department, July, 1917.

which, as ultimately fixed by the 8th codicil to his will, aggregate \$972,000. The 9th paragraph of his will provided:

"I hereby make, nominate and appoint my nephews by marriage, Everett L. Crawford and Henry U. Palmer and my friend S. Clinton Sherwood, executors of this my last will and testament, and as I expect and desire that said S. Clinton Sherwood shall take the most active part in the management of my estate and the care and maintenance of my daughter under the trust herein established for her benefit, but that he shall always act with the advice and approval of the two other executors, or such of them as shall qualify, I direct that the sum of Fifteen hundred dollars per annum be paid to S. Clinton Sherwood out of the income of my estate as special compensation for such extra care and management, in addition to all commissions which he would be entitled to by law as such executor and trustee if no special compensation were given to him herein."

Outside of the 7th paragraph of his will, the opening clause of which has been quoted, there is no general residuary clause of the usual type in the original will; but his 1st codicil thereto bearing date the same day as the will itself provided:

"In case my estate remaining undistributed as mentioned in the Seventh Paragraph of my said Will, shall not be sufficient to pay in full all the bequests contained in said Seventh Paragraph, then I direct my executors first to pay in full the bequests therein made to the Salvation Army in the United States, the Young Men's Christian Association of the City of New York and the American Bible Society, and to pay the rest of said legacies *pro rata*.

"And if it should happen that anything should remain of my estate after paying in full all of the bequests given by my said Will, then I direct that such surplus shall be divided equally between the three corporations last above named.

"And in all other respects I hereby ratify and confirm my said Last Will and Testament."

By the 7th codicil, executed December 31, 1909, testator revoked the appointment of Henry U. Palmer as one of his executors and trustees, and further provided:

"Item. In case it should appear at or after my decease that I have devised and bequeathed to benevolent, charitable, literary, scientific, religious or missionary societies, associations or corporations, in trust or otherwise, more than one-half of my estate, after the payment of my debts, and that for any reason such devises or bequests are invalid to some extent; then and in such case only, I hereby give, devise and bequeath to my friend Mr. S. Clinton Sherwood, all that portion of my estate as to which such devises or bequests may be invalid, and which otherwise would descend or be distributed to, or among my heirs, or next of kin."

The questions arising for determination upon this appeal have to do with the disposition to be made of the accumulated income of the estate. The income from the trust estate is over \$60,000 a year, and the amount expended on behalf of the testator's daughter has averaged \$20,000 a year. On September 15, 1913, at the end of the first year of trusteeship, the unexpended income had increased to \$167,489.27. Thereupon, pursuant to the power conferred by section 5 of the 4th paragraph of the will, the trustees paid out of the surplus income all the pecuniary legacies, aggregating \$40,200, bequeathed by the 5th paragraph of the will, and such payments were concededly authorized. The amount of accumulated income was thus reduced to \$127,289.27, but by April 27, 1915, it had increased to \$209,845.96. It is contended on behalf of the testator's daughter and her presumptive next of kin (being her nieces) that the entire income belonged to the daughter with the exception only of the sum of \$40,200 heretofore paid by the trustees pursuant to the provisions of the 5th paragraph of the will; that the trustees are authorized and empowered to apply so much of the net income from the testator's trust estate as is required for the care, support and maintenance of his daughter, and to hold the remaining net income not so expended, if any, as custodian for the said daughter for her future benefit, to be paid upon her recovery to her or from time to time to any committee of her property that may be meanwhile legally appointed, or, if not so paid, upon her death to her executors or administrators; that the trustees have power, with the acquiescence of S. Clinton Sherwood, to apply the whole of the net income of the said

App. Div.]

First Department, July, 1917.

trust fund for the use and benefit of the said daughter during her life; that testator's will does not empower S. Clinton Sherwood to determine in their or his discretion what the share of the testator's daughter in the income of the trust fund shall be, or how much of the income is bequeathed to her, but merely empowers Sherwood to determine in his discretion how much of the income bequeathed to her shall be expended for her benefit, and makes the trustees custodians of the unexpended balance during the time that Sherwood shall deem the testator's daughter mentally incompetent; that there is an absolute disposition of the net income of the said trust (except the sum of \$40,200) to the testator's daughter, qualified only as to the manner of payment and enjoyment as hereinbefore stated; that the will contains no express direction for an illegal accumulation of income, and in so far as it contains any implied direction for accumulation of income such implied direction, being invalid, will be deemed surplusage and eliminated from the will, the entire income from the said trust fund being otherwise validly disposed of by the will itself.

The charitable organizations to which the testator bequeathed an aggregate of \$972,000 contend that the surplus income of each year did not vest in the decedent's daughter; that there was no effectual disposition of the surplus income under the will, and that consequently the surplus income for each year belongs to those presumptively entitled to the next eventual estate, being the charitable corporations to which the specific bequests of \$972,000 were made, and who claim as well the residuary estate of \$326,810.33, which they have been awarded by the judgment herein.

S. Clinton Sherwood contends that the unexpended income did not belong to the testator's daughter but should be paid *pro rata* on account of the specific legacies to the corporations named in article 7 of the will, and that if the charitable corporations should receive all of such unexpended income during the daughter's lifetime and then upon her death all the principal of the trust fund, there would be a gift of more than one-half of the testator's estate (less his debts) to charitable corporations, coming within the prohibition of the Decedent Estate Law (Consol. Laws, chap. 13 [Laws of 1909,

chap. 18], § 17); and that, therefore, under the specific gift to him contained in the 7th codicil, he is entitled to receive a present vested interest, subject only to the provision in favor of the daughter, in that portion of the testator's estate over and above the one-half thereof which may properly be paid to such charitable corporations.

The learned referee has held that the testator did not intend to leave the surplus income from the trust fund to his daughter, and that there was no valid direction for its accumulation, nor was there any effectual disposition of the surplus income; and that, therefore, that portion of the income not expended for the daughter's benefit was not disposed of by the will but passed by operation of law to the charitable corporations as owners of the next eventual estate; and that, therefore, the statute had not been violated.

As I read the testator's will, its provisions are inconsistent with an interpretation which would give to the daughter less than the whole income of the trust estate, subject to the exercise of the discretion of the executors as to how much thereof should be applied to her care and maintenance, but in no event less than \$5,000. This discretion by one of the codicils is vested in Sherwood. The 3d subdivision of the 4th paragraph, as will be seen, authorizes the executors to pay to the daughter when in their opinion she recovers her mental and physical health, the whole of the interest and income of his property not used to pay legacies, and those legacies, as will hereafter be seen, are only the ones specified in the 5th paragraph of his will, aggregating \$40,200, and which have already been paid. The care with which these comparatively small legacies are authorized to be paid out of surplus income and the larger legacies withheld for payment until her death, is evidence in itself of the fact that the testator did not contemplate that the surplus income each year over what was expended on his daughter should be exhausted in paying off nearly \$1,000,000 of legacies left to charitable corporations. The payment of the \$40,200 of legacies would not have made an appreciable difference to the income for more than a single year, and those legacies were of an intimate and personal kind which the testator evidently wished to have paid off as speedily as possible.

App. Div.]

First Department, July, 1917.

The only clause of the will from which an intention is spelled out that the unexpended trust income should not belong to the daughter is the 7th, which provides that all the trust fund constituted by the 4th paragraph that should remain undistributed by the executors at the decease of his daughter, after payment in full of the legacies directed to be paid in the 5th paragraph of his will, be distributed in a certain manner. But this does not seem to me to be controlling in view of all the other provisions of the will, and in view of the further fact that the \$40,200 of legacies were not required to be paid by the executors out of surplus income, but were only authorized so to be paid, and it might well have been that the executors might have deemed it unwise to pay these legacies out of surplus income, in which case the language just quoted would have been apt. Nor is the provision of the 6th codicil, by which a trust fund of \$10,000 was created for the purpose of paying a reward to the person who might give information which should lead to the conviction of the person guilty of the murder of his son (which trust was to be held during the joint lives of the two trustees, Crawford and Sherwood), and further providing that the income accruing from said sum, so far as the same should not be needed for advertising, should be applied as directed in his will for the application of income from his estate or, failing such direction, should form part of the residue of his estate. This language is not controlling, for it might well have been framed to meet the possibility of the daughter's death before the expiration of this \$10,000 trust, and in any event it is not sufficient to destroy the force of the testator's intent as gathered from the rest of the will.

That the language used by the testator created a gift to the daughter of the entire income from the trust fund (subject only to the payment of the specific bequests of \$40,200) is well supported by the authorities. The decision in *Matter of Hoyt* (116 App. Div. 217; *affd.* without opinion, 189 N. Y. 511) is very closely in point. There the testator gave his executors a trust fund and directed them to "keep the same invested and to collect and receive the interest, dividends and income therefrom and from each and every part thereof and to apply to her use for and during her natural life in

the most bounteous and liberal manner as to expenditure and so as to promote her convenience and comfort and gratify her reasonable desires, the said interest, dividends and income so to be collected and received as the same shall be required for her use and benefit;" further "that the said sum of money hereinabove in this article directed to be appropriated and held in trust for and during the natural life of my daughter, Mary Irene, and for her use as above herein provided as to the interest, dividends and income therefrom, or the securities in which the same shall be invested, and any surplus of income therefrom, if any, which shall not have been applied to her use during her natural life shall, on the death of my said daughter, go and be distributed to and among" certain persons named. The court said: "If it be assumed that the intent of the testator was to give the remaindermen the surplus income which the trustees determined was not necessary for the use of the daughter, then the gift is invalid as involving an unlawful accumulation. The statute limits the accumulation of income to the period of minority. (1 R. S. 726, §§ 37, 38.) If it be true, as contended by the respondents, that the testator intended to lodge in his trustees a discretion as to the amount of income to be applied to his daughter's use, then this necessarily clothed them with authority to accumulate the residue (*Cochrane v. Schell*, 140 N. Y. 516), which authority could not be enforced inasmuch as it contravenes the provisions of the statute with reference to accumulations. But the trustees, acting under a void authority, did accumulate a surplus, and now the question is presented, to whom does it belong? The surrogate assumed that it passed to the remaindermen under the provision of the statute which provides that 'When, in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation or of the ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.' (See 1 R. S. 726, § 40; Real Prop. Law [Laws of 1896, chap. 547], § 53.) The conclusion of the surrogate is correct, if the statute is applicable. I do not think it is. The rule

App. Div.]

First Department, July, 1917.

seems to be well settled that where the direction for an accumulation is void, and there is some other and legal disposition of the rents and profits, the statute does not apply; that in such case the direction for accumulation should be eliminated from the will.

"The direction to accumulate in this will can be stricken out and there then still remains a valid disposition of the rents and profits. The testator gave the fund to the trustees to collect the income from each and every part of it. He clothed his trustees with power to apply the entire income to the use of his daughter. He also clothed them with power, in their discretion, if they did not think she needed all of the income, to accumulate it, and if they did so, he gave it to the remaindermen. The authority, as we have seen, to accumulate is void but the authority to pay the entire income to the daughter is nevertheless valid and enforceable. If this be true, then the daughter was entitled to the entire income and whatever had accrued at the time she died passed to her representatives. This conclusion, it seems to me necessarily follows from the rule laid down in *Pray v. Hegeman* (92 N. Y. 508), and *Barbour v. DeForest* (95 id. 13)."

In *Hill v. Guaranty Trust Co.* (163 App. Div. 374) the testatrix gave her residuary estate to her executors and trustees upon the following terms: "To receive the rents, issues, income and profits thereof and to apply the whole, or such portions of such rents, issues, income and profits, as my said executors and trustees may deem advisable, for the use and benefit of my son * * * during his natural life, and on the death of my said son I give, devise and bequeath all of said rest, residue and remainder of my estate with the accumulations, if any, thereon * * * to my said sister Marie Hill absolutely and forever." The son at the time of the execution of the will was a life convict and after his mother's death became insane and was still so when suit was brought. The executors at the time of the accounting had applied only a small portion of the income to his use and the remainderman sought to have the accumulated income paid to her as the person presumptively entitled to the next eventual estate. This was refused, the court saying, in part: "Although a considerable surplus has been accumi-

lated, it is by no means certain that circumstances may not arise, before the termination of the trust, under which the trustees might deem it advisable to apply all this income to the use and benefit of the beneficiary. The direction to apply so much of the income as the trustees may deem advisable does not mean that they must determine, upon receipt of each payment of income, how much thereof shall be applied to the use and benefit of the beneficiary; on the contrary, I think the testatrix plainly intended that they should hold, subject to his use, all the income, irrespective of the amount immediately applied. Such a direction is not necessarily invalid. In *Bloodgood v. Lewis* (209 N. Y. 95) the will of the testator gave the income from a quarter of his estate to his daughter Mary, providing that if Mary, in the judgment of his daughter Rosetta, should continue to be of unsound mind and incapable of managing her own affairs, the income should be paid to Rosetta to be applied by her in the care and comfort of Mary. By a codicil he provided that, owing to Rosetta's feeble health, he made the trustees the judges of Mary's condition in place of Rosetta, and directed them, if they considered Mary incapable of managing her own affairs, to pay to Rosetta so much of the income of the trust fund for Mary as, in their discretion, might be required for her comfortable care and support. There being no direction for the immediate payment of the residue of the income to any one, this court held that the accumulated residue was an unlawful accumulation and belonged to the persons presumptively entitled to the next eventual estate. (*Bloodgood v. Lewis*, 146 App. Div. 86.) The Court of Appeals, however, held that the entire income was given to Mary under the will and that the codicil did not revoke the gift, but rather empowered the trustees 'to determine, in their discretion, how much of the one-fourth equal part bequeathed to her should be expended for her benefit, and made them custodians and conservators of the unexpended balance.'

"There is, therefore, in the present case nothing unlawful in the trustees holding the unexpended balance in their hands — certainly not if the will of the testatrix be construed as giving the entire income to her son. Whether the will should be so construed is a question which is not necessary to deter-

App. Div.]

First Department, July, 1917.

mine at this time. It does dispose of the remainder 'with the accumulations, if any, thereon,' but the word 'accumulations' in this connection does not necessarily refer to the income. But however that may be, I am clearly of the opinion that the testatrix intended that the income not immediately applied to the use of her son should be held by the trustees subject to his use during his life. If, in order to effectuate this intent, the will must be construed as giving him the entire income, the time and manner of payment being left to the discretion of the trustees, it is susceptible of this construction and should be so construed, but the question may never arise. Under the statute (Real Prop. Law [Gen. Laws, chap. 46; Laws of 1896, chap. 547], § 53; now Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 63), which is also applicable to personal property (*United States Trust Co. v. Soher*, 178 N. Y. 442; *Mills v. Husson*, 140 id. 99; *Cook v. Lowry*, 95 id. 103), the plaintiff is entitled to the income not applied to the use of the beneficiary only upon the ground that such income is undisposed of. For the reasons stated the income now in the hands of the trustees cannot be so considered, because the trustees have the right at any time to apply any or all of it to the use of the beneficiary. Until the trust has terminated it will be impossible to tell how much, if any, of it will remain undisposed of.

"If this conclusion be correct, then the trustees should continue to hold the income not immediately applied, subject to its future application, if they deem it advisable for his use and benefit."

In *Matter of Bavier, No. 1* (164 App. Div. 358), where there was a trust fund created for the benefit of a feeble-minded person, the court cited with approval *Hill v. Guaranty Trust Co.* (*supra*) and said: "This court, reviewing the authorities, held that the will did not, either expressly or by necessary implication, direct any accumulation of the income; that although a considerable surplus had been accumulated, it was by no means certain that circumstances might not arise, before the termination of the trust, under which the trustees might deem it advisable to apply all this income to the use and benefit of the beneficiary, and that the trustees should continue to hold the income not immediately applied,

subject to its future application, if they deemed it advisable, for the *cestui que trust's* use and benefit.

"We think, as the question here involved has so recently been determined by that well-considered case, it is unnecessary to discuss it further."

In *Matter of Bavier, No. 2* (164 App. Div. 363), the will gave to the trustees two-thirds of the net rents, issues and profits of certain real estate in trust to apply the same or so much thereof as testator's wife during her life or the surviving trustees after her death might think necessary or proper for the care, education, maintenance and support of the testator's daughter and such issue as she might have. The daughter was an incompetent, although not judicially declared so to be. The will then provided that upon the daughter's death the income from the trust fund with any and all surplus thereof unexpended, if any, should be divided in certain alternative ways. There was also a direction that if, under the provisions of the will, there should remain in the hands of the trustees accumulations of the net rents, issues and profits not authorized by the laws of the State of New York, the same should be regarded as real property, and be distributed according to the statutes of New York relating to descent. Upon the accounting there was found a balance of unexpended income which the surrogate held to be an unlawful accumulation and, therefore, under the will distributable according to the Statute of Descent. This court said: "There is no express provision in this will for any accumulation of income, and the direction for the distribution of such is only precautionary and made in view of the discretionary power vested in the trustees by the 4th clause of the will. The conclusions reached by Mr. Justice CLARKE in *Matter of Bavier, No. 1* (164 App. Div. 358) are found upon considerations equally applicable to the case at bar and require a like disposition of the present appeal."

It will be seen that in this last cited case there was an express disposition of accumulated income, as in the case at bar. We deem it unnecessary to cite further the cases in line with these determinations, believing that they sufficiently establish the law applicable to the question before us. The testator's clear intention as deducible from the will being that

App. Div.]

First Department, July, 1917.

his daughter should have the entire income of the trust fund (except \$40,200) applied to or available for her use as long as she should live, his intention should be carried out. This limits the discretion of the trustees or Sherwood to determining how much of the income bequeathed to Miss Dexter shall be expended for her benefit and makes the trustees custodians of the unexpended balance for her as long as she is deemed incompetent, and does not (as would the contrary view) substitute them for the testator and allow them to reduce her share and increase that of the residuary legatees at will. In other words, they are what they should be, administrators of the fund only, and not disposers of it. We agree with the learned referee in his conclusion that the discretionary power given to the trustees under paragraph 4, subdivision 5, of the will is limited to the legacies specified in paragraph 5 of the will and that it was neither the intention nor direction of the testator that the bequests to the \$972,000 class should be paid out of unexpended income.

The conclusions of law found by the learned referee herein should be modified by including the nine conclusions of law proposed on behalf of the defendant Clarissa Treadwell Dexter, and the appropriate findings of fact in connection therewith, and by reversing the findings of fact and conclusions of law inconsistent therewith, and the judgment appealed from will be modified accordingly, so as to adjudge that the defendant Clarissa Treadwell Dexter is entitled to the entire net income of the trust created in and by said will for her life, with the exception only of the sum of \$40,200 heretofore paid by the plaintiffs pursuant to the provisions of the will to the legatees mentioned in paragraph 5 thereof. Costs and disbursements are awarded to all parties appearing upon this appeal, payable out of the estate.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concurred.

Judgment modified as directed in opinion, with costs to all parties appearing upon this appeal, payable out of the estate. Order to be settled on notice.

In the Matter of the Probate of a Paper Propounded as the Last Will and Testament of MARY SWEENY, Deceased.

MARGARET SWEENY and Others, Appellants; DENIS SWEENY, Respondent.

First Department, July 18, 1917.

Will — probate contested on grounds of fraud and undue influence — evidence not justifying verdict for contestants — evidence — past transactions showing family history.

Appeal from a decree of the Surrogate's Court denying probate of a will upon the ground that the execution thereof was procured by fraud, deceit and undue influence. The testatrix left her estate to her daughters and gave to her sons only nominal bequests upon the ground stated in the will that they had, during her husband's lifetime, received ample advancements from him, etc. Evidence examined, and *held*, absolutely insufficient to support a finding of fraud or undue influence by the jury, and that the decree of the surrogate should be reversed and the will admitted to probate. In such proceeding in the Surrogate's Court it was error to take evidence otherwise clearly inadmissible, upon the theory that it would place upon the record the whole history of the family of the testatrix.

APPEAL by Margaret Sweeny, proponent, and others from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 6th day of July, 1916, denying probate to a paper propounded as and for the last will and testament of Mary Sweeny, deceased, and also from an order entered in said Surrogate's Court on the 23d day of March, 1916, denying their motion to set aside the verdict of the jury herein.

Michael J. Horan, for the appellants.

Jay Noble Emley [*John Edmond Hewitt* with him on the brief], for the respondent.

DOWLING, J.:

Mary Sweeny died in the county of New York January 24, 1915, leaving a last will and testament dated July 21, 1914, whereby she left each of her three sons, Denis, James and Joseph, the sum of \$50, stating that she made no other provision for them as her husband during his lifetime had made ample provision by transferring his business to them and advancing them large sums of money. To her daughter

App. Div.]

First Department, July, 1917.

Mary she left \$10,000, to her daughter Esther \$15,000, and the residue of her estate to her daughter Margaret. She had made a prior will October 25, 1910, by which she had left each of her sons \$5, giving the same reason for her action, dividing the residue of her estate among her three daughters equally after leaving a granddaughter \$1,000. The will was originally contested upon all the grounds usually urged, but on the trial the evidence was directed to the issue of undue influence and the case was submitted to the jury on that ground alone. The decree recites that the execution of the will was procured by fraud, deceit and undue influence and probate is refused for that reason. No useful purpose would be served by discussing at length the evidence in the case, in view of the fact that, in our opinion, the record is absolutely devoid of any testimony which in the slightest degree tends to support the verdict of the jury. There is nothing in the evidence which justified the submission of the issue to the jury, and the motion made at the close of the case by the attorney for the proponent to direct a verdict on the ground that the contestant had failed to sustain his objections should have been granted. There are many rulings upon questions of evidence which in themselves would have called for the reversal of the decree and the granting of a new trial, were it not for the conclusion we have reached as to the failure of the contestant to make out any case whatever. The history of the Sweeney family was allowed to be given in evidence before the jury for the purpose of exciting their sympathy or prejudice, and statements made by the husband of the decedent over twenty years ago were allowed to be given in evidence by the contestant, including statements made by the husband of testatrix (not in her presence) that he had turned his property over to her for the purpose of keeping it in her name until she died and then for her to give it to her children share and share alike. The contestant was allowed to testify as to injuries received by his brother James in the business and the circumstances under which he received them; he was also allowed to testify to all manner of personal transactions with his father and the details of his business with him, including alleged advances made to his father over twenty years before towards the purchase of

certain real estate; also to what his father told the contestants' wife to do; also to transactions with his mother in his efforts to obtain loans from her eight or nine years before the will was made; with a variety of other incompetent and objectionable testimony, all of which was received in evidence upon the apparent theory, as was said in ruling upon the admission of one line of improper testimony, "This is simply to get in the whole history of the Sweeny family." The jury evidently did not decide the questions submitted to them upon the testimony, for there was absolutely no testimony upon which they could have founded their verdict. They must have decided the case upon the same theory which apparently was indicated by the learned surrogate when improper evidence was sought to be introduced in relation to the dealings of a firm composed of two of the sons and the wife of the contestant. In ruling upon the objection the learned surrogate said: "I will admit it on the question of undue influence. If this man was the one who created the business and was the brains of the family, it would have a bearing on that question, whether, under the conditions, his mother should not take care of him, and it is on that theory that I admit it." To this the appellants took exception.

There is no question whatever that Mary Sweeny was mentally competent to make a will; there is no question that her will was properly executed. The record is barren of any evidence justifying the finding of undue influence, fraud or deceit upon the part of anybody, even with all the improper and incompetent testimony in the record which was received upon the trial. Not only was there no evidence to support the verdict, but there was no evidence to warrant the submission of the issue of undue influence to the jury, and the motion to direct the probate of the will should have been granted.

The decree and order appealed from will, therefore, be reversed, with costs, and the will of the decedent ordered to be admitted to probate.

CLARKE, P. J., SMITH, PAGE and SHEARN, JJ., concurred.

Decree and order reversed, with costs, and proceeding remitted to Surrogate's Court for further action in accordance with opinion.

App. Div.]

First Department, July, 1917.

**JAMES J. E. BURKE, Plaintiff, v. UNION PACIFIC RAILROAD
COMPANY, Defendant.**

First Department, July 18, 1917.

**Carrier — liability for loss of goods — bill of lading construed —
agreement limiting liability of carrier — Interstate Commerce
Law construed.**

Where a bill of lading covering the entire shipment of merchandise from Japan to the State of New York, and thus including transit across the continent by the defendant railroad, expressly provided that the goods are valued by the shipper at not exceeding \$100 per package and that "the liability of the Companies therefor" in case of loss shall not exceed \$100 per package, the shipper cannot recover in excess of that sum where the goods were destroyed while being transported by the defendant in this country, even though it is admitted that the real value of the goods was greatly in excess of that stated.

As the agreement was a "through bill of lading" its terms as to value were intended to apply to any of the successive carriers, including the defendant.

Although an interstate shipment, whether originating in this country or abroad, is controlled so far as concerns that portion of the transportation which is interstate, by the Interstate Commerce Law, and the rules, form of contract and classification established in pursuance of that law, nevertheless said law and the schedules filed thereunder do not forbid a limitation of the carrier's liability such as is contained in the bill of lading aforesaid. In fact the 3d section of the uniform bill of lading allows a lower valuation of goods to be agreed upon.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Arthur W. Clement [*Wilson E. Tipple* with him on the brief],
for the plaintiff.

Oscar R. Houston, for the defendant.

SCOTT, J.:

The only question at issue in this controversy is the amount of damages which the plaintiff is entitled to recover for the loss of certain goods shipped from Japan to this country and then transported over defendant's railroad. The liability of defendant is not questioned, the only dispute being as to the amount for which it is liable.

The goods, consisting of fifty-six cases of merchandise,

were shipped from Yokohama, Japan, by the Pacific Mail Steamship Company, to be delivered at New York to the shipper's order. It was carried by the steamship company to San Francisco, and there delivered to the Southern Pacific Company, a common carrier, and by that company transported to its junction with defendant and there delivered to said defendant. While in defendant's hands the property was totally destroyed. As has been said the defendant concedes its liability, and it is stipulated that the fair, reasonable and market value of the goods was \$17,549.01, for which sum, with interest, the plaintiff demands judgment.

The defendant claims, however, that it is liable for no more than \$5,600 with interest. This claim is based upon a clause in the bill of lading issued by the steamship company reading as follows: "It is expressly agreed that the goods named * * * are hereby valued at not exceeding \$100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed \$100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the Carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of \$100.00."

This is a very common form of agreement as to value and has frequently been upheld and enforced (*Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Greenwald v. Barrett*, 199 N. Y. 170), and it is of no moment that the freight charges do not appear to have been based on this valuation of \$100 per package. (*Reid v. Fargo*, 213 Fed. Rep. 771, 773; *affd.* on this point, 241 U. S. 544, 551.)

It is also apparent that this agreement as to value was intended to apply to any of the successive carriers. The bill of lading was denominated "through bill of lading," and it called for the transportation of the goods "from Yokohama, via San Francisco to New York." The freight charge was made up of two items, one the ocean rate, and the other the rail rate, and the bill of lading provided that the goods were "to be transported by the Pacific Mail Steamship Company on board the steamship *Persia* * * * from Yoko-

hama unto the Port Of San Francisco, or so near thereto as safe navigation of such vessel or vessels shall then permit * * * and there upon the arrival of said Steamer in like condition to be received by and delivered unto the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company or the Western Pacific Railway Company, or any one of them, and thence to be transported by said Company and connecting Railroad Companies to New York and there in like condition to be delivered unto * * * Order." And finally the clause fixing the valuation of \$100 per package (quoted above) speaks of the liabilities of the "companies" and later of the "carriers," which it would not have done if it had been intended to limit the effect of the stipulation as to value to the first carrier, viz., the steamship company.

The plaintiff, however, contends that in so far as concerns the transportation of the goods from San Francisco to New York, the shipment must be regarded as being governed exclusively by the provisions of the defendant's filed classification, tariffs, etc., and the uniform bill of lading on file with the Interstate Commerce Commission, and that since the limitation upon the defendant's liability, contained in the steamship company's bill of lading is not to be found in any of the classifications, tariffs or in the uniform bill of lading, the defendant may not avail itself of the agreement as to value. We have no doubt that the Interstate Commerce Act applied to so much of the shipment as was had by rail after the goods had been landed at San Francisco (See 24 U. S. Stat. at Large, 379, § 1, as amd. by 34 id. 584, § 1, and 36 id. 544, § 7), and inasmuch as the shipper gave no notice that he elected to ship subject to the common-law rules of liability, the shipment, so far as concerns defendant, must, we think, be deemed to have been made under the filed classifications and rates and under the terms of the uniform bill of lading, notwithstanding no such bill was, in fact, ever issued or signed. (See rule 9 of Western Classification No. 53, in force at the time of the shipment and stipulated as a part of the submission.) In other words, an interstate shipment, whether originating in this country or abroad, is controlled, so far as concerns that portion of the transportation which is interstate, by the

Interstate Commerce Law, and the rules, forms of contract and classifications established in pursuance of that law.

Granting this, however, does not serve to sustain the plaintiff's claim. While the filed schedule of classifications, rates, etc., do not in terms provide for such a valuation as was made in this case and a consequent limitation of the carrier's liability, they do not forbid it. The uniform bill of lading, however, does explicitly so provide.

Its 3d section reads as follows: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper or *has been agreed upon* or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

This section establishes four alternative measures of value or bases of liability. The first is the invoice value, and the third is "a lower value * * * agreed upon." The shipment for the loss of which plaintiff seeks to recover damages falls distinctly within this third class. A lower value than the invoice price had been distinctly agreed upon between the initial carrier and the shipper and had been expressed in the bill of lading. Since, as already said, that agreement was obviously made not only for the benefit of the initial carrier, but for that of each successive carrier, the defendant is entitled to the benefit of it, precisely as if a bill of lading in the uniform form had been issued and the agreement as to value had been written into it.

It follows that there must be judgment for the plaintiff for \$5,600, with interest, with costs to the defendant.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Judgment for plaintiff as stated in opinion, with costs to the defendant. Order to be settled on notice.

TIFFANY STUDIOS, Plaintiff, v. JACOB SEIBERT, JR., and Others, as Executors of and Trustees under the Last Will and Testament of WILLIAM B. DANA, Deceased, and Others, Defendants.

First Department, July 18, 1917.

Assignment — when assignee of beneficiary in will entitled to proceeds of lands taken by eminent domain — will — power of sale construed — when condemnation of lands equivalent to sale by testamentary trustees.

Submission of a controversy upon an agreed statement of facts pursuant to the Code of Civil Procedure. The plaintiff, a creditor of a beneficiary under a will and as assignee of her interest in moneys which were the proceeds of lands of the estate taken by eminent domain and held by the executors, claims to be entitled to the share of the assignor and asks that the executors be required to pay over the same. The defendant executors contend that, under the terms of the will, the plaintiff's assignor could only become entitled to the proceeds of the land in case they were voluntarily sold by the trustees under a discretionary power given by the will, and that the taking of the lands by eminent domain was not such sale as vested the assignor with any interest in the proceeds.

Held, that the taking of the lands by eminent domain was in fact a sale within the meaning of the will which, as construed by the court, entitled the assignor to share in the proceeds without restriction and that the only discretion conferred upon the executors related to the price and terms of sale.

When the proceeds of the lands taken by eminent domain were received by the testamentary trustees in cash they became personal property and subject to distribution under the terms of the will.

LAUGHLIN, J., dissented.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Robert Thorne, for the plaintiff.

Winthrop E. Dwight and *Jacob Seibert, Jr.*, for the defendants Jacob Seibert, Jr., and others.

Alfred Ely, for the defendants Davis Collamore & Company, Ltd., and others.

Harold S. Deming, for the defendant William Shepherd Dana, individually and as trustee.

DOWLING, J.:

William B. Dana died on October 10, 1910, leaving a last will and testament dated April 12, 1909, and a codicil thereto dated September 13, 1910, which were duly admitted to probate in the county of Suffolk, State of New York, on November 28, 1910. Three separate trusts were created under these instruments. The first was of his holdings of capital stock in the William B. Dana Company, which he left to Jacob B. Seibert, Jr., and Ethel Dana Shepherd in trust, to receive the income thereof for certain designated purposes and periods, with the following provisions:

"I empower my said trustees, however, at any time in their discretion to sell all of said stock in one block at public or private sale at such prices and upon such terms as they may determine, and to invest and reinvest the proceeds in any manner in their discretion, being free from the usual restrictions as to trustees' investments, the income of such substituted investments to be disposed of in like manner as is above directed with respect to the income of the stock. At the expiration of such trust, I give and bequeath and direct my said trustees to transfer and deliver three hundred shares of said stock, or substituted investments representing the proceeds of sale of such proportion of said stock, to Jacob Seibert, Jr.; * * * and the remainder of such stock or the substituted investments representing the proceeds of sale of the remainder of such stock, I give and bequeath and direct my said trustees to transfer and deliver to William Shepherd Dana."

The second trust (which is the subject of this controversy) is thus set forth in the will:

"*Third.* I give and devise to my executors all my right, title and interest in and to the parcels of real estate with the appurtenances, situated in the Borough of Manhattan, in the City of New York, known as number 76½ Pine Street, and numbers 142 to 150 Worth Street, and 3 to 6 Mission Place, and number 17 Ann Street, and also all my estate known as Greycliff, in Englewood, New Jersey, and all my other real estate in New Jersey, except that hereinafter expressly devised in the eighth and ninth paragraphs hereof, IN TRUST, to hold the same and collect the rents, issues and

App. Div.]

First Department, July, 1917.

profits thereof, so long as William Shepherd Dana, my adopted son, shall live and twenty-one years shall not have expired and to pay the same, after the deduction of all proper charges and expenses to the persons entitled to the residue of my estate according to the provisions hereof and in the same proportions. I authorize my executors to lease any or all of said real estate, or at any time during the continuance of this trust to sell any or all of the same at such prices and upon such terms as they may deem advisable. I also empower my executors to mortgage parcels of my real estate for the purpose of providing money for improving such parcels. In the event of any such sale I direct my executors to thereupon terminate the said trust to the extent of the property so sold and to pay the net proceeds of such sale to the persons entitled to the residue of my estate according to the provisions hereof and in the same proportions. Upon the termination of this trust by limitation of time or by the death of my adopted son, William Shepherd Dana, I give and devise such of said real estate as shall then remain unsold to the persons entitled to the residue of my estate according to the provisions hereof and in the same proportions." There is then a third trust created of premises 136 to 140 Front street, New York city, the income wherefrom is to be paid to Ethel Dana Shepherd and William Shepherd Dana for life, and it is provided: "I authorize my executors to lease said premises, or, at any time during the continuance of this trust, to sell the same at such price and upon such terms as they may determine, and to invest and reinvest the proceeds in any manner in their discretion, being free from the usual restrictions as to trustees' investments. The income of such substituted investments to be disposed of in like manner as above directed with respect to the rents, issues and profits of the said premises. Upon the death of both Ethel Dana Shepherd and William Shepherd Dana, I direct my executors to convey the said premises or to transfer and pay over the investments representing the sale of said premises to the issue of William Shepherd Dana, or if there be no such issue, then to the person entitled to the residue of my estate, according to the provisions hereof and in the same proportions."

The testator then devised his land at Mastic, N. Y., to Ethel

Dana Shepherd and William Shepherd Dana for life with remainder to the issue of the latter. He bequeathed certain personal property in various houses to the same two persons and made devises and bequests to various individuals, including a devise to Ethel Dana Shepherd of a lot of land 300 feet square fronting on Floyd street, Englewood, N. J. His residuary estate he divided into five shares, whereof two each were bequeathed to Ethel Dana Shepherd and William Shepherd Dana.

By his codicil he first devised and bequeathed his land known as " Moss Lots " at Mastic, N. Y., with the personal property therein and thereon and the personal property at Greycliff, Englewood, N. J., or in storage, to Ethel Dana Shepherd for life, and after her death to William Shepherd Dana or his issue; or if he should die without issue prior to the death of Ethel Dana Shepherd, then to the latter absolutely.

As to the second trust the codicil provided:

" I give and devise to my Executors all my right, title and interest in and to the parcel of real estate with the appurtenances situated in the Borough of Manhattan in the City of New York, known as No. 76½ Pine Street and Nos. 142 to 150 Worth Street, and Nos. 3 to 6 Mission Place, and No. 17 Ann Street, and also my Estate known as Greycliff in Englewood, N. J., and all my other real estate in New Jersey, except, that expressly devised in paragraph numbered eighth to ninth of my said Last Will and Testament, IN TRUST, to hold the same and collect the rents, issues and profits thereof so long as William Shepherd Dana, my adopted son, shall live and twenty-one (21) years shall not have expired since my death, and to pay the same after the deduction of all proper charges and expenses to Ethel Dana Shepherd [and William Shepherd Dana] in equal portions during their lives, the survivor to receive during his or her life the portion which the deceased would have received if living. I authorize my Executors to lease any or all of said real estate, or at [any] time during the continuance of this trust to sell any or all of the same at such prices and upon such terms as they may deem advisable. I also empower my Executors to mortgage any parcel of my said real estate for the purpose of providing money for improving said parcel. In the event of any such

App. Div.]

First Department, July, 1917.

sale, I direct my Executors to thereupon terminate the said trust to the extent of the property so sold and to pay one-half of the net proceeds of such sale to Ethel Dana Shepherd, or if she be not living, to William Shepherd Dana, or if he be not living, to his issue, and the other half of the net proceeds of such sale to William Shepherd Dana. Upon the termination of this trust by limitation of time or by the death of my adopted son, William Shepherd Dana, I give and devise such of said real estate as shall then remain unsold, one-half to Ethel Dana Shepherd and one-half to William Shepherd Dana, or if he be not living, to his issue."

Prior to the making of either the will or codicil, and on March 22, 1905, William B. Dana had made a trust deed of 655 shares of capital stock of the William B. Dana Company to Jacob Seibert, Jr., the income therefrom to be paid to Dana during his life and at his death to Ethel Dana Shepherd during her life, and upon her death to William Dana Shepherd during his life. The deed contained the following provisions:

"Should the Executor or Executors of my last Will and Testament decide to sell the stock of William B. Dana Company which may form part of my estate at my death, and arrange to include the shares held in this trust as part of the sale, my said Trustee, upon the request of my said Executor or Executors, shall sell such shares, provided the price and terms are as favorable as those accorded to the stock belonging to my estate. And my said Trustee is empowered to invest the proceeds and to dispose of the income from such substituted securities in like manner as above directed."

After Mr. Dana's death and in the year 1911, Mrs. Shepherd had the house at Mastic, L. I., then occupied by herself and her son William Shepherd Dana, decorated and furnished by the Tiffany Studios at an expense of \$42,208.10. She then represented to plaintiff that she was unable to pay the entire cost at once, but would make a payment of \$1,000 and give her notes for the balance, and she stated that she had a large income from the Dana estate and expected to shortly receive a large amount under the Dana will, which would enable her to liquidate the entire indebtedness before all the notes became due. In fact she did pay notes aggre-

gating \$6,000, and the interest thereon, but the balance of \$36,208.10 with interest still remains due. On August 7, 1912, Mrs. Shepherd executed to plaintiff an assignment of her share of the proceeds of sale of the premises 142-150 Worth street, New York city (embraced in the second trust) as security for her indebtedness to it, the assignment to cover either the proceeds of sale or the taking of the property by the city of New York in condemnation proceedings, it being recited that she was "entitled under the said last will and testament of William B. Dana, deceased, in the event of and upon the sale of said premises to be paid and to receive and have individually for herself one-half of the proceeds thereof." William Shepherd Dana became of age November 1, 1913. From testator's death up to this date his mother had received about \$21,000 as his guardian and \$33,000 on her own account from the several trust funds. Meantime, title to the properties 142 to 150 Worth street and 3 to 6 Mission place (embraced in the second trust fund) had been taken by the city of New York in condemnation proceedings and on October 8, 1913, the sum of \$282,049.80 was paid over to and received by the trustees of the Dana estate as the fair price or value of the said properties as found and determined in the condemnation proceedings, and which funds, less the necessary expenses, are now in the hands of the trustees. Mrs. Shepherd died June 27, 1914, leaving a last will and testament, but practically no estate except her claim to one-half of the proceeds of sale of the premises in question. The statement of fact shows that she had lived extravagantly, that there were twenty-three unsatisfied judgments of record against her, that she had executed some thirty-one assignments of interest in the proceeds of sale of the property taken by the city to secure indebtedness and that she was also indebted to one of the executors. But it is conceded that plaintiff dealt with her in good faith and in ignorance of her debts and extravagance. The trustees have refused to recognize the assignment to plaintiff, denying that Mrs. Shepherd was entitled to receive any part of the sum paid by the city for the premises in question, on the ground that no sale thereof was had within the meaning of the will. The sole question presented by this submission is whether the acquiring by the city of New

App. Div.]

First Department, July, 1917.

York in condemnation proceedings of the title to the property in question and the payment therefor in cash by the city of New York to the executors and trustees of the Dana estate constituted a sale of the said property within the meaning and the intention of the provisions of the will and codicil of deceased. Plaintiff claims it did, and that the proceeds of said property so received by the trustees became immediately payable to Ethel Dana Shepherd and William Shepherd Dana. The executors and trustees claim that it did not and that the proceeds of such taking by the city should be held and administered by the trustees in accordance with the terms of the trust created by the will and codicil.

The first question to be considered is whether the taking of the land in question by the right of eminent domain, is a sale of the property taken. I think this must be answered in the affirmative. In *Bell Telephone Company v. Parker* (187 N. Y. 299) Judge BARTLETT said: "In the view of the law the condemnation proceeding, when carried to a conclusion favorable to the plaintiff, operates as a purchase of the land or an interest therein for the sum fixed by the commissioners." In *Hunter v. City of New York* (151 App. Div. 30) the court held: "Acquiring property by condemnation in a legal sense is a purchase and sale of the land, or of the interest authorized to be taken." And in *Cruger v. Union Trust Company* (173 App. Div. 797) Mr. Justice McLAUGHLIN said (pp. 803, 804) as follows: "It is also contended by the defendant that the award received by the trustee for the interest in the pier referred to should be deemed realty and for that reason not affected by the revocation. This interest was conveyed to the trustee by the plaintiff and was acquired by the city in a condemnation proceeding, in which title vested in February, 1914. The award, amounting with interest to over \$11,000, was not paid to the trustee until February 23, 1916, shortly before the attempted revocation. As to this award, I am of the opinion that when it was received by the trustee in cash it constituted personal property under the decision in *Sperry v. Farmers' Loan & Trust Co.* [154 App. Div. 447]. Under the trust indenture the trustee was authorized to sell all or any part of the real estate and invest the proceeds in specific securities, reinvestment in real

estate not being permitted without the written consent of the plaintiff. If the trustee had voluntarily sold the interest in the pier to the city the proceeds would unquestionably have been personal property. The fact that the trustee parted with the interest by operation of law can make no difference. In the *Sperry* case, where the trust property conveyed consisted almost entirely of an undivided interest in realty, which was sold under a testamentary power, the court held that the proceeds paid to the trustee were personalty. It is true the award takes the place of land and is to be considered as realty for the purpose of determining to whom the same should be paid. If the plaintiff had revoked the trust as to the personalty before the award had actually been paid over to the trustee, then the authorities cited by the defendant might be applicable, and there would be presented a question whether the revocation could affect it; but once the moneys were paid over to the trustee, their identity was lost and there is no more reason for considering that sum as realty than the proceeds of any of the other real estate voluntarily sold by the trustee." (See, also, *Vandermulen v. Vandermulen*, 108 N. Y. 195.)

But, even if the taking by the city be deemed to be a sale of the property taken, was it a sale within the meaning of the will? The executors and trustees urge that it was not; that the sale contemplated by the will was one within the control and volition of the trustees; that they were to determine the circumstances when a sale should be wise and proper; that they were to exercise their discretion as to whether a sale should be had, having in mind whether the welfare and best interests of the beneficiaries would be subserved by giving them money, whether the sale was advantageous as to price, and whether an emergency had arisen which called for distribution of the principal of the estate. In other words, the trustees were to decide whether a sale should be had or not, with a view not only to its effect upon the estate but upon the beneficiaries as well. It is claimed that both the intention and the reasonable meaning of the testator in regard to the property in question were that the trustees should exercise their voluntary discretion as to whether it was advisable that the property should be sold and the proceeds of such sale

App. Div.]

First Department, July, 1917.

given to the beneficiaries of the trust; that the trustees have in no way exercised any discretion, and that for the court to determine that the taking of the property by condemnation was such a sale as was contemplated by the will, would be to introduce therein an entirely different meaning and intention than that expressed by the testator. The difficulty with this contention is, that it reads into testator's will a much broader discretionary power than testator conferred. While testator may have meant to guard some of the trust estates created by him from the danger of being dissipated, and, therefore, carefully provided for the continuance thereof during the lifetime of Mrs. Shepherd and her son, he did not mean that she should have none of the principal of his estate, for he left her some real and personal property outright and gave her absolutely two-fifths of his residuary estate. Moreover, while he was most exact and definite in his provisions for the reinvestment of the proceeds of any sale of the properties embraced in the first and third trusts in his will, as well as in the trust deed, with equal exactness and definiteness, he not only omitted any reference to any reinvestment of the proceeds of any sale of the property embraced in the second trust, but provided explicitly for the immediate termination of that trust as to all or any of such property when sold. There is a clear proof of the intent and meaning of the testator that Mrs. Shepherd and her son should have the proceeds of any sale thereof, without restriction or delay of any kind, and without any discretion vested in his executors to withhold their shares, no matter what their views might be as to the expediency of paying the money over to them. The will confers no discretion upon the executors save as to the prices and terms of sale; that is, the adequacy of the price and the sufficiency of the terms. They were neither directed nor authorized to make a sale having in mind the situation of the rest of the estate, nor the advisability of allowing Mrs. Shepherd and her son to have the control of the proceeds. The latter phase the testator determined himself by ordering that the money should be paid to them as soon as the sale was made. The only discretion the executors were to exercise was as to whether they were getting full value for the property and upon terms that insured full payment

of the purchase price. That exercise of discretion was met and satisfied by a taking of the property by the city, when its full value must be assumed to have been awarded and by payment of the whole consideration in cash.

Judgment will, therefore, be directed that the taking by the city of New York in condemnation proceedings of the properties described in the 3d clause of the will of William B. Dana, deceased, and in the codicil thereto, was a sale of the said properties within the meaning and intention of said will and that the proceeds of said properties so received by the executors and trustees of said William B. Dana, deceased, became and was immediately distributable and payable to William Shepherd Dana and Ethel Dana Shepherd, or her assignees, in equal parts, subject only to the expenses of the said executors and trustees; and that a reference be ordered herein to determine the rights and priorities as between themselves of the defendants and of any other parties claiming to have any interest in said moneys by virtue of assignment, judgment, lien or otherwise; and that upon the coming in of the report of such referee, the said executors and trustees of said William B. Dana, deceased, be directed to pay over the said one-half of said money received from the city of New York, together with the interest and income thereon since the receipt thereof by said executors, less the expenses, to the person who shall be found entitled thereto. Costs and disbursements of this submission are awarded to all the parties who have submitted briefs thereon, payable out of said fund.

CLARKE, P. J., SMITH and PAGE, JJ., concurred; LAUGHLIN, J., dissented.

Judgment directed as stated in opinion; costs to all parties who have submitted briefs herein, payable out of the fund. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
LUNA AMUSEMENT COMPANY, Appellant.

Second Department, June 8, 1917.

Labor Law — employment of female in mercantile establishment after ten o'clock in the evening — sale of chewing gum at booth in amusement park — "mercantile establishment" defined.

A corporation conducting an amusement park which employs a female eighteen years of age to sell chewing gum in a small booth after ten o'clock in the evening is properly convicted of a violation of subdivision 2 of section 161 of the Labor Law.

Such booth for the sale of chewing gum, although of diminutive size, is a "mercantile establishment" within the meaning of the Labor Law.

APPEAL by the defendant, Luna Amusement Company, from a judgment of the Court of Special Sessions of the City of New York, Part Two, entered in the office of the clerk of said court on the 11th day of January, 1917, convicting it of violating subdivision 2 of section 161 of the Labor Law (Consol. Laws, chap. 31 [Laws of 1909, chap. 36], as amd. by Laws of 1915, chap. 386).

Robert W. Seaton, for the appellant.

Harry G. Anderson, Assistant District Attorney [*Harry E. Lewis*, District Attorney, with him on the brief], for the respondent.

THOMAS, J.:

The Labor Law (Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 161, subd. 2, as amd. by Laws of 1915, chap. 386) prohibits the employment after ten o'clock in the evening in a mercantile establishment of a woman over sixteen years old, with exceptions not here material. Celia Pedowitz, about eighteen years old, was on August 18, 1916, at ten fifty-five p. m. employed by the defendant Luna Amusement Company in selling chewing gum. The business was carried on in a booth about six feet square wherein was the girl, vending to the passersby in the defendant's amusement park. The question is whether the

person was working in a mercantile establishment. Let it be assumed that she was selling needles, pins, shoe-strings, or other notions. Would that be a mercantile establishment? I think so, because the Labor Law, section 2, defines a "mercantile establishment" as "any place where goods, wares or merchandise are offered for sale." A booth six feet square is a diminutive establishment, but it is a place where gum was sold. Is gum classed with "goods, wares or merchandise?" Chewing gum is an important subject of manufacture and sale, and its use is proven by phenomena of which observers of national habits may take notice. If a large quantity of it were shipped for transportation, it would be classed as goods and the purchaser would be regarded as buying merchandise. If the woman had been employed in the jobbing houses, she would be considered as engaged in a mercantile establishment. But the gum so sold and purchased in bulk is distributed through innumerable retailers. The dimensions of their shops and the magnitude of their sales cannot determine whether they are within or without the statute. The plea that the trader is too minute to be noticed by the law would enable every small article of merchandise to be sold by women kept at labor beyond the prescribed hours. I perceive no reason for allowing women to be overworked at night in selling gum as a part of the defendant's amusement park. The business seems to be of sufficient consequence to require relays of attendants.

The judgment of conviction of the Court of Special Sessions should be affirmed.

JENKS, P. J., STAPLETON, MILLS and RICH, JJ., concurred.

Judgment of conviction of the Court of Special Sessions affirmed.

JOSEPH V. WILSON and CHARLES D. WILSON, Copartners
Doing Business under the Firm Name and Style of WILSON
BROTHERS, Respondents, v. THE LONG ISLAND RAILROAD
COMPANY, Appellant.

Second Department, June 22, 1917.

**Common carriers — interstate commerce — action by shipper to
recover demurrage charges — jurisdiction of State court prior to
investigation of Interstate Commerce Commission — voluntary
payment without protest no defense.**

A State court has jurisdiction of an action to recover demurrage charges which plaintiffs, the receivers of interstate carload freight from defendant, a common carrier, had paid to defendant upon its demands for holding cars in its yard prior to placing them upon plaintiffs' private track, in which action the reasonableness of the defendant's rule as to freight tariffs is not assailed, but in which recovery is sought upon the theory that the defendant failed to comply with said rule in that its agent did not give the plaintiffs the written notice required thereby, although there has been no investigation and determination by the Interstate Commerce Commission as to the validity of the charges.

Said charges may be recovered although payments were made voluntarily and without protest.

APPEAL by the defendant, The Long Island Railroad Company, from a judgment of the County Court of Kings county, entered in the office of the clerk of said county on the 13th day of October, 1916.

Dominic B. Griffin [*Joseph F. Keany* with him on the brief],
for the appellant.

Neil P. Cullom [*Arthur W. Rinke* with him on the brief],
for the respondents.

MILLS, J.:

This is an appeal by defendant from a judgment entered in Kings county October 13, 1916, in favor of the plaintiffs for \$1,366.34, upon a verdict for \$1,275.73, rendered at a trial term of the Kings County Court, such verdict being directed by the trial court. The action was brought to recover certain demurrage charges, amounting to \$1,212, with interest, which plaintiffs, the receivers of interstate carload freight from defendant, a common carrier, had paid to defend-

ant, upon its demands, for holding cars in defendant's freight yard prior to placing them upon plaintiffs' private track.

Under rule 5 of defendant's freight tariffs, established according to law and with the approval of the Interstate Commerce Commission, it was entitled, in charging demurrage, to consider cars as placed upon such a private track as by "constructive placement" when actual delivery thereon "cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive," provided that "The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee." The recovery was asked and indeed given for charges made and collected upon such cars with interstate shipments so held upon defendant's tracks because of such inability of the plaintiffs to receive them upon their own private track, but the defendant's agent in each such instance failed to send or give to the plaintiffs such written notice. The payment in each instance appears to have been made without any protest. Respondents' brief claims that there was evidence of such protest, but appellant's counsel, in his reply brief, asserts that the evidence thus referred to did not show any protest, and I think he is correct in that view. The witness merely testified that he said that the charges were "in excess," but failed to specify how or to what extent. As the verdict was directed against the exception of the defendant, which asked that the case be submitted to the jury upon all questions, it is manifest that the verdict must be tested here upon the theory that the payments were made without protest.

Appellant presents here two contentions in support of its appeal, viz.: (a) That the State court is without jurisdiction of the action until after investigation and determination by the Interstate Commerce Commission as to the validity of the charges; and (b) that the charges, having been paid voluntarily and without protest, cannot be recovered.

As to such first contention, appellant's counsel cites and relies upon *Hunter, Inc., v. N. Y., N. H. & H. R. R. Co.* (97 Misc. Rep. 26), wherein the Appellate Term in the First Department last October held that such an action could not

be maintained in the State courts until application had first been made to the Interstate Commerce Commission for redress. The opinion did not recite at any length or in detail the facts, so that it is impossible therefrom to determine just what the nature of the overcharge was. The governing rule, however, seems to have been clearly laid down in two recent decisions of the United States Supreme Court, viz.: *Pennsylvania Railroad v. Puritan Coal Co.* (237 U. S. 121, 127) and *Pennsylvania Railroad v. Sonman Coal Co.* (242 id. 120).

In each such case the action was brought in a State court by a shipper against an interstate carrier to recover damages for the latter's failure to furnish sufficient cars. The gist of the decision in each of those cases is that the action may be brought in either the State or Federal court unless the reasonableness of the tariff rule is assailed, and that where its reasonableness is admitted and the claim is based upon the alleged failure of the carrier to comply with the rule, resort may be had to either court.

In the instant case the reasonableness of said rule 5 is not assailed by the plaintiffs, but the recovery has been sought and obtained upon the contention that the defendant failed to comply with that rule, in that its agent failed to give the plaintiffs the written notice thereby required. I think, therefore, that the State court has jurisdiction of the action.

As to the second contention of the appellant, namely, that there can be no recovery because the payments were voluntarily made by plaintiffs, that is, without protest, it appears to have been decided by the Court of Appeals in *Pennsylvania R. R. Co. v. Titus* (216 N. Y. 17) that in the case of freight tariff charges which had been duly established by the rules approved by the Interstate Commerce Commission, the parties cannot by their "agreement, mistake or artifice" change them, and that where they have attempted to do so the balance unpaid may be recovered. In that case the action was by the carrier to recover three dollars and forty-five cents which it had charged the shipper too little, and accepted the balance from him. Fifteen months later the carrier discovered its error in computing the charge and demanded payment of the shortage, and that being refused the action

was brought. The expression in the opinion (p. 22) upon the subject is very broad and would seem equally applicable in favor of the shipper suing to recover an excess paid by him upon the carrier's demand.

I advise, therefore, that the judgment of the County Court of Kings county be affirmed, with costs.

JENKS, P. J., STAPLETON, PUTNAM and BLACKMAR, JJ., concurred.

Judgment of the County Court of Kings county affirmed, with costs.

THE PEOPLE'S TRUST COMPANY, as Substituted Trustee under the Last Will and Testament of OSCAR F. HAWLEY, Deceased, Respondent, v. HENRY N. DOOLITTLE and Others, Appellants, Impleaded with OSCAR F. HAWLEY, JR., if Living, and Others, Respondents.

Second Department, June 8, 1917.

Mortgage — deduction of amount of mortgage from purchase price paid by grantee — assignment of bond to executors to secure payment of debt to estate — when mortgagee not entitled to cancellation of mortgage — promise to pay debt of another founded upon valuable consideration — when mortgagee takes subject to such promise.

Where a remainderman entitled to lands under a will mortgaged his remainder to the executors to secure a bond held by them and as to which for a valuable consideration the remainderman had agreed to indemnify and hold harmless the obligor on the bond, a purchaser of the mortgaged premises who paid to his grantor, the remainderman, only the difference between the purchase price and the amount of the mortgage and who took subject to the mortgage, is not entitled to have the instrument canceled or to a decree requiring the executors to collect a sum due to the estate from the mortgagor by means of his personal note given to them, rather than by enforcing the bond secured by the mortgage, which bond the executors held by an assignment.

Such a decree would enable the mortgagee and his assigns to acquire the lands for less than the purchase price, as the amount of the mortgage debt had been deducted.

The mortgagee has no standing to contend that there was no privity between the mortgagor and the obligor of the bond or the executors, for a person for a valuable consideration may agree to pay the debt of another and to secure such payment may mortgage his lands.

App. Div.]

Second Department, June, 1917.

APPEAL by the defendants, Henry N. Doolittle and others, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Kings on the 1st day of June, 1916, upon the decision of the court after a trial at the Kings County Special Term.

Charles Thaddeus Terry [*Edward Ward McMahon* with him on the brief], for the appellants.

Conrad Saxe Keyes [*George W. Wingate* and *T. Ellett Hodgskin* with him on the brief], for the respondents.

THOMAS, J.:

In January, 1888, in consideration of \$6,592.41, there was conveyed to Henry N. Doolittle premises known as 40 and 42 Gold street in the city of New York, "Subject to the trusts contained in the Will of Oscar F. Hawley, Senior, and Subject also to a mortgage now on said premises, given to secure the payment of Fourteen thousand dollars and interest." The purchase price was "reduced by just the amount of the mortgage," and all the grantee bought was "the remainder of Oscar F. Hawley, Jr., * * * whatever it was." Through a mesne conveyance the property was quitclaimed to Josephine L. Doolittle, who died in 1915, whereupon her heirs at law conveyed to Henry L. Doolittle, their father. In this action Doolittle would have the mortgage canceled, and all the interest paid by him and his wife on the mortgage, some \$20,000, repaid. If Doolittle's contention prevail, he would get the property for \$6,592.41, although, as he testified, \$14,000 was deducted from the purchase price. On that theory he would get the land for \$1, had he bought for that consideration subject to the mortgage. Indeed, if he prevail, instead of buying the remainder of the Hawley interest, as he testified that he did, he would get the whole of it, and instead of an equity of redemption he would have the whole estate, and instead of subjecting the fee to the \$14,000, as the deed provided pursuant to the agreement of sale, he would get the land free from the incumbrance. It is worth while to consider by what skill in technicalities he seeks to rid the land of its burden and to aggrandize his purchase. The result seems to make the appellant's proposal impossible. The land subject

to a trust for a life belonged to Oscar F. Hawley, Jr., by devise from his father, Oscar F. Hawley, Sr., who died in 1879. In September, 1885, Oscar F. Hawley, Jr., executed the mortgage in question upon his interest to the executors of his father's will. The consideration named is \$14,000, but the real purpose is described in the condition, which is: "this grant being intended as security for the payment of the said sum of money and interest mentioned in the condition of a certain bond or obligation, dated the Eighth day of September, 1879, executed and delivered by Russell Johnson to Edwin C. Hawley and by said Hawley assigned to the parties of the second part hereto on the 19th day of September, 1879, which by an agreement in writing dated the 23rd day of March, 1880, between the party of the first part hereto and the said Russell Johnson, the said party of the first part, for a valuable consideration assumed and agreed to pay and further agreed to indemnify and save harmless the said Johnson against any claim, liability or demand on account of said bond." The whole history is very simple. Edwin C. Hawley owned Johnson's bond for \$14,000 and assigned it to the executors. For a valuable consideration, Oscar in writing agreed with Johnson to pay the bond, and, pursuant to that agreement, Oscar gave the mortgage, and as Edwin had assigned the bond to the executors, Oscar's mortgage ran to the executors. And now comes the owner of the equity of redemption and says that the mortgage shall not be paid to anybody, because there was no consideration for it, although Oscar, who made it, stated that he, for a valuable consideration not here disputed, had promised to pay Johnson's bond, and to make good that promise was giving the mortgage, and, as the mortgage indicates, it was made to the executors because the bond had been assigned to them. It was Oscar's duty to pay the bond where he found it, and he pledged his property to do it. The object of the mortgage is to assure the payment of the bond, and it was and is the executors' duty to collect the money secured by the mortgage. The money so collected is applicable to the payment of the bond, which the executors hold. Why do they hold it? Edwin C. Hawley owed his father, and the will directed that the debt should be paid out of a devise to Edwin. Edwin gave the executors his

App. Div.]

Second Department, June, 1917.

note for a balance of \$30,000 due on his indebtedness, and assigned the Johnson bond to secure the payment. So the executors had two funds: (a) Edwin's share in the estate; (b) the Johnson bond for \$14,000, which Oscar had agreed to pay and which it was his duty, both moral and legal, to pay, and in fulfillment of which he put a mortgage lien on his land and delivered it to the assignees of the bond. But the appellant would have a decision that the executors should collect Edwin's note out of his share, and as that is plenty, let the Johnson bond go uncollected and cancel the mortgage and so let the Johnson bond go unsecured. But Oscar wanted to pay the bond as he had agreed. He appropriated his property for the purpose, and the executors were empowered to sell Oscar's land to effect the purpose. The executors hold the mortgage in trust for the payment of the Johnson debt. The will gave them one security. Some judgment is mentioned directing the payment of Edwin's debt out of his share. But that did not deal with the bond, nor did it prevent a strengthening of the testamentary fund. But if the executors accept collateral to Edwin's bond, they must remember that, subject to its appointed use by them, it belongs to Edwin, and when Oscar delivered his mortgage to make surer the bond, and they accepted it, it was their right and duty to collect it or to turn it back to Edwin, or, as he has died, to his estate. The appellant urges that there is no privity between Oscar and Edwin or the executors. I assume that, if a man for a valuable consideration agrees to pay another's debt, he is privileged to deposit his property with the man that owns the debt, and empower him to sell the property to do it, or he may put a mortgage on his land and authorize the owner of the debt to sell it by process of law. I cannot conceive of a surer way of establishing privity and clinching it. The appellant argues as if the mortgage was made to secure Edwin's indebtedness. That is an error that misleads. The mortgage is to secure the Johnson bond, and runs to those who have the title to it. That title is conditional, as the executors hold the bond as security for Edwin's debt, but with that debt paid, the bond or its avails, so far as unused, with the collateral, belongs to Edwin or his successors. What disposition the executors or their suc-

cessors make of money cannot interest Doolittle. Whether Edwin's debt be paid from his share in his father's estate, or so far as it will go from the Johnson bond or its collateral, is a question between the trustees and the Edwin Hawley family. Who, indeed, is the appellant that he should say there is no consideration, no privity; that the Johnson bond should go unsecured; that Edwin's debt should be paid out of his share, the mortgage canceled and the interest paid returned? Oscar F. Hawley, Jr., made and executed the mortgage, and transferred all his property to Henry Patton to pay his debts. So Patton, with such rights as the sweeping assignment gave, takes all Edwin had before Doolittle was known. Then Patton quitclaimed to McGraw in consideration of \$6,000, but subject to the mortgage. Then McGraw conveyed to Doolittle, who got an equity of redemption—the fee incumbered for \$14,000—the interest of Oscar with so much subtracted, and Doolittle agreed by accepting the deed that it should be subtracted. He himself subtracted it from the purchase price. There has been transferred to him no chose in action, no cause of action that Oscar or his assignee had. Oscar wished to be honorable to Johnson and took a way to do it. Doolittle would make Oscar dishonorable to Johnson, and would undo what he did. He has no transfer of a right to do that, but rather expressly ratified what had been done. It is an error to assert that Doolittle stands in Oscar's relation to the mortgage. He does only in that he confirmed the transaction and shut himself off from questioning it. No one is suing anybody on Oscar's promise to Johnson. *Lawrence v. Fox* (20 N. Y. 268) has received elaborate and useful presentation. Happily this case requires none of it. Oscar himself executed his promise. It is something settled, and Doolittle said that he would buy on the basis of the thing done. He did so, and his deed binds him to it.

The judgment should be affirmed, with costs.

JENKS, P. J., STAPLETON, RICH and BLACKMAR, JJ., concurred.

Judgment affirmed, with costs.

App. Div.]

Second Department, June, 1917.

CATHERINE CROMBIE, Respondent, v. GEORGE J. O'BRIEN,
Appellant.

Second Department, June 22, 1917.

Street railroads — motor vehicles — injury to intending passenger struck by automobile while within eight feet of car — municipal ordinance — contributory negligence — due care by plaintiff in guarding against injury — presumption that driver of automobile will obey ordinance.

In an action for personal injuries it appeared that the plaintiff left the sidewalk with the intention of boarding a street car which had stopped for the purpose of taking on passengers, and that when within eight feet of the car was run down by defendant's automobile, which was passing the car in violation of a municipal ordinance.

Held, on all the evidence, that the plaintiff exercised due care in guarding against injury from the defendant's car entering the prohibited zone.

The plaintiff was bound to exercise such care only as was commensurate with the danger.

The plaintiff had the right, in a measure at least, to rely on the presumption that the driver of the automobile would obey the law and not enter the prohibited zone within eight feet of the street car.

Moreover, if the plaintiff had seen the approaching car she could still have relied on the presumption that it was slowing down with the intention of stopping in obedience to the law.

THOMAS, J., dissented, with opinion, with whom JENKS, P. J., concurred, in memorandum.

APPEAL by the defendant, George J. O'Brien, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of October, 1916, upon the verdict of a jury for \$600.

Henry Siegrist [*Otto D. Parker* with him on the brief], for the appellant.

Frank W. Holmes, for the respondent.

BLACKMAR, J.:

The plaintiff left the sidewalk with the intention of boarding a trolley car which had stopped for the purpose of taking on passengers, and when within eight feet of the car was run down by defendant's automobile. The defendant's car

was in that place in violation of an ordinance of the city of New York, and the question is whether, under those circumstances, the plaintiff exercised due care in guarding against injury from the defendant's car entering the prohibited zone. The ordinance forbidding vehicles to move within eight feet of a trolley car standing for the purpose of receiving or discharging passengers, was enacted for the very purpose of preventing just such accidents as the one under consideration. It was passed in recognition of the fact that passengers leaving and entering cars have their attention so directed to this purpose that they can give but little attention to passing vehicles. And yet it is proposed to us in the dissenting opinion by Mr. Justice THOMAS to decide that the plaintiff was negligent in failing to effectively guard against defendant's violation of the law. It cannot be contended that there is not some evidence of the exercise of care, for the plaintiff testified that she glanced to the east but did not see the defendant's car. But it is claimed that this is not evidence of freedom from contributory negligence because she did not see what was before her face and guard against it. This places a burden on the plaintiff, justified neither by reason nor authority. She was bound to exercise such care only as was commensurate with the danger. That necessarily means the danger apparent to her or which she should have apprehended. But I suggest that the rule is well settled that one may rely, in a measure at least, on the presumption that others will obey the law. The defendant had no more right to drive his car within eight feet of the standing trolley car than to drive it through a safety zone physically marked off, such as those established for the safety of pedestrians in Fifth avenue, Manhattan. In fact, the ordinance was enacted to create a safety zone in order to enable passengers to enter it and give attention to mounting the steps of the standing car, without danger from approaching vehicles. It is suggested that as she did not see the slowly-approaching car, the look was not the scrutiny which the law required. The purpose of looking, whether it is called a scrutiny or glance, is to see. If the plaintiff had seen the approaching car, she could still have relied on the presumption that it was slowing down for the purpose of stopping in obedience to the law. The

App. Div.]

Second Department, June, 1917.

plaintiff relied on the assurance of safety in the eight-foot zone which the law gave, and that reliance is not negligence as matter of law, and, it being a question of fact, we should affirm the judgment, with costs.

STAPLETON and RICH, JJ., concurred; THOMAS, J., read for reversal, with whom JENKS, P. J., concurred in separate memorandum.

THOMAS J. (dissenting):

The plaintiff and her sister were walking on the sidewalk towards the west. Plaintiff entered upon the street with the purpose of taking a street car waiting near the middle of the block. Her statement is: "As I went to step off the corner I got three or four steps and I heard my sister say, 'Oh, look out,' and immediately Mr. O'Brien's car had struck me." She testified that she heard no warnings. There was nothing to divert or to absorb her attention, save her anxiety to board the car. The place was near the end of the Fulton street car line in Jamaica. Subdivision 3 of section 17 of article 2 of chapter 24 of the Code of Ordinances of the City of New York provides: "In overtaking or meeting a street car, which has been stopped for the purpose of receiving or discharging a passenger, no vehicle that is subject to the provisions of subdivision 1 of this section shall pass or approach within 8 feet of such car so long as the same is stopped and remains standing, for the purpose aforesaid." (See Cosby's Code Ord. [Anno. 1915] pp. 337, 338. Now Cosby's Code Ord. [Anno. 1917] p. 517.) The automobile was proceeding slowly, and although the car had reached the end of the line and changed to the return track, where it was taking passengers, the disregard of the ordinance was sufficient evidence of negligence. (*Amberg v. Kinley*, 214 N. Y. 531.) The only question is whether the evidence shows that the plaintiff's negligence contributed to the accident. The question has arisen whether the plaintiff had the duty of looking to her left—to the east—lest a vehicle might be oncoming in disobedience of the ordinance; that is, whether a pedestrian entering the street under such circumstances should use any efficient care. The traveler could consider that the ordinance existed, and place some reliance upon its

observance, that would modify the range and vigor of his circumspection, but he could not enter the street without some useful search. There are statutes and ordinances that regulate the traversing and crossing of streets, but they do not excuse care on the part of the wayfarer. There are or have been many familiar instances of statutes or ordinances to protect people on the street, such as gates, or flagmen, or warnings at railway crossings, that teams shall travel to the right of the traveled part of the way, that horses shall not be left unhitched in the street. And yet it would be hardly contended that inexcusable disobedience of the statute absolves a traveler injured thereby, if he used no circumspection, although it may mitigate the care he should observe. If, now, the person entering the street must use care, it is a vain thing to say that a jury can deem the person prudent, if he merely uses care that is so inadequate that he does not see a ponderous object moving upon him. It is not usurping the functions of the jury in this instance to declare that the care used was totally inoperative. A glance that has no compass cannot be exalted into a look that is in any legal sense protective. The learned trial justice properly charged the jury to the effect that care was required on the plaintiff's part. That became the law of the case. The jury found that what plaintiff did was due care. This is what she said that she did: "I kind of glanced both ways to see if there was anything coming. * * * Q. How far did you glance both ways — to the east? A. I don't know just how far, but I didn't see any vehicle coming, didn't see anything at all. Q. Did you take much time looking? A. I gave a little glance. I knew the trolley car was standing there, and I didn't think" — latter part of answer stricken out. "Q. You didn't take much time to look? A. I just took a casual glance as I would any time in the city." Latter part of answer was stricken out. "Q. Did you stop when you came to the curb or keep on walking? A. I kept on walking; I kind of glanced and went right ahead to the car. Q. You gave a glance and didn't pay much attention? A. Well, no, but enough to see if there was anything coming. Q. Did you look both ways? A. I was facing the west, there was no need to look that way." That the plaintiff did not pay attention "enough to see if

App. Div.]

First Department, July, 1917.

there was anything coming," is evident, for the car was imminent and a look that could be regarded as having any searching quality would discover it. Indeed, the record shows that the automobile was coming at a moderate speed, and yet plaintiff did not see it until her sister called to her, and then she had "just a glance" of it before it struck her. The verdict disregards the charge; it makes what was a hasty, unproductive glimpse a scrutiny. This conclusion is not converting a question of fact into a question of law, except as it is the duty of the court to declare that a thing so faint and bodiless as a hurried gleam, that misses an impending touring car and discovers only void space, cannot be sufficient evidence of care.

The judgment should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., concurred.

JENKS, P. J. (dissenting):

I concur with THOMAS, J., for a reversal, being of opinion that his conclusion does not convert a question of fact into a question of law save as to the absence of any proof of care on the part of the plaintiff.

Judgment affirmed, with costs.

FRANK BAILEY, Respondent, v. S. S. STAFFORD, INC.,
Appellant.

First Department, July 18, 1917.

Contract — agreement authorizing defendant to sell under its own name product manufactured by plaintiff — suit to enjoin defendant from manufacturing and selling similar product after termination of agreement — right of defendant to use its own trade name — pleading — complaint not stating cause of action — injunction.

Action to enforce by injunction a negative covenant in writing. The complaint in substance alleged that the plaintiff, who manufactured an ink eradicator, gave to the defendant exclusive right to sell the same under the defendant's trade name, while the defendant on its part agreed

not to handle any other ink eradicator during the period the agreement was in force, the same to be terminated by either party by giving six months' notice in writing. By a subsequent agreement the defendant further agreed that it would not manufacture, cause to be manufactured, or sell any ink eradicator in imitation of that manufactured by the plaintiff, or put up in similar packages labelled with similar labels, so long as the plaintiff furnished its eradicator to the defendant at a stated price. There was no time set for the continuance of this second agreement. It was further alleged that the defendant, having terminated the agreement by written notice, was manufacturing and selling an ink eradicator of its own make and under its trade name. The only respect, however, in which it is claimed that the packages used by the defendant resembled those formerly used for the plaintiff's eradicator under the contract was the similarity in the name of the product, for the defendant continued to brand its new product with its own trade name.

Held, that the complaint failed to state a cause of action and should be dismissed, and that an order granting a temporary injunction should be reversed. This, because the defendant, not having otherwise contracted, had a right to use its own name in its business and that no unfair imitation of the plaintiff's package was shown.

As the second agreement between the parties was not limited as to the time of its duration it was terminable at the will of either party upon giving a reasonable notice to the other.

APPEAL by the defendant, S. S. Stafford, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of February, 1916, granting a preliminary injunction, and also from an interlocutory judgment entered in said clerk's office on the 29th day of February, 1916, overruling a demurrer to the complaint.

Charles E. Kelley, for the appellant.

James A. Davis, for the respondent.

PAGE, J.:

The action is brought to enforce by injunction a negative covenant in a written agreement. The plaintiff has for some years manufactured and sold a chemical ink eradicator, and the defendant has for many years been engaged in the manufacture and sale of writing inks. The complaint alleges the making of an agreement between the parties on January 25, 1901, whereby the plaintiff agreed to manufacture and put up for sale his ink eradicator under the name of "Stafford's

App. Div.]

First Department, July, 1917.

Ink Eradicator" and to allow the defendant the exclusive right to sell the same, the plaintiff agreeing, during the continuance of the agreement, not to appoint any other agent or to supply any other person or persons with the said product, and the defendant agrees, for the same period, not to handle any ink eradicator of any other make or description. After stating other agreements not material to this case the contract provides that "this agreement to be terminated by either party by giving the other six months' notice to that effect, in writing."

On March 28, 1904, the parties entered into another contract which provided that the plaintiff agrees to manufacture a fluid ink eradicator, the bottles containing it to be inclosed in cartons or wrappers similar to those theretofore used by the plaintiff in offering for sale the ink eradicator manufactured by him, describing the same, and to have printed thereon S. S. Stafford's Ink Eradicator. The defendant agrees to purchase the ink eradicator so manufactured and put up and to pay therefor as therein required. The plaintiff "covenants and agrees that he will not at any time during the continuance of this agreement, or after the termination of the same, sell or offer for sale any fluid ink eradicator under the name of S. S. Stafford's Ink Eradicator." The 4th subdivision of the contract which it is sought to enforce by this action reads as follows:

"And the party of the second part [the defendant] covenants and agrees that from and after the execution of this agreement it will not at any time, either alone or jointly with, or as agent for any person or persons, firm or corporation, manufacture or cause to be manufactured, and sell or offer for sale any fluid ink eradicator or any ink eradicator in imitation of the ink eradicator manufactured by the party of the first part, or put up in similar cartons, boxes, forms or wrappers and labelled with similar labels, so long as the party of the first part furnishes this eradicator at the above price of thirteen dollars per gross."

On January 16, 1915, the defendant notified the plaintiff that after six months from said date the agreement between them would terminate and that defendant would cease purchasing ink eradicating fluid from the plaintiff. The com-

plaint then alleges that on or about the 1st day of October, 1915, the defendant "commenced to manufacture and sell under the names 'Stafford's Ink Eradicator' and 'Stafford's Ink Annihilator for Removing Ink' an ink eradicator which was not manufactured by nor bought from the plaintiff, and defendant has ever since said date continued to manufacture and sell a fluid ink eradicator upon the packages and cartons of which appear the labels 'Stafford's Ink Eradicator' and 'Stafford's Annihilator for Removing Ink;' this fluid ink eradicator manufactured and sold by the defendant is in imitation of the eradicating fluid manufactured by the plaintiff, and the labels on the cartons, boxes or packages of the defendant are similar to the labels of the plaintiff's boxes and cartons *with respect to the name* 'Stafford's Ink Eradicator' and 'Stafford's Annihilator for Removing Ink,' *and in this respect* are in imitation of plaintiff's labels." Then follow allegations that the defendant is using the said names to mislead and deceive the general public into purchasing its eradicator, in the belief that it is purchasing the eradicator manufactured by the plaintiff, and that the ink eradicator sold by the defendant and labelled "Stafford's Ink Eradicator" and "Stafford's Annihilator for Removing Ink" has a ready market and is sold in large quantities, and that by reason thereof the defendant is making large sales that otherwise would be made by the plaintiff to his great and irreparable damage; that defendant has thereby become a competitor of plaintiff, where formerly it was a customer, and such sales have contributed and will contribute to deprive plaintiff of a market for "Collin's Ink Eradicator" which he has been and still is manufacturing and selling to the general public; that the defendant is appropriating to itself all the good will, reputation and popularity of the commodity known to the general public as "Stafford's Ink Eradicator." The plaintiff demands judgment that the defendant, its agents, etc., be restrained and enjoined from manufacturing and selling any fluid ink eradicator, or from using the names "Stafford's Ink Eradicator" or "Stafford's Annihilator for Removing Ink" or names similar thereto. An injunction *pendente lite* has been granted in the terms of the demand for judgment.

The defendant demurred to the complaint for insufficiency,

and an interlocutory judgment was entered overruling the demurrer. While there are some allegations in the complaint appropriate to a cause of action for unfair trade and competition, it is not claimed that it is intended thereby to present such a cause of action. It is conceded that there is no imitation of the package or carton formerly used by the parties during the period of the contract, nor is it claimed that the defendant is imitating the package or label of plaintiff's product known as "Collin's Ink Eradicator." The sole questions presented are, has the defendant the right to manufacture or sell any ink eradicator, and if it has, can it use the name "Stafford's Ink Eradicator" or "Stafford's Annihilator for Removing Ink" upon the packages or cartons in which the same is inclosed. The learned justice below has held that inasmuch as there was no provision for terminating the contract of March 28, 1904, it is still a subsisting binding agreement, notwithstanding the six months' notice of its termination given by the defendant to the plaintiff on January 16, 1915. In this he is clearly in error. When a contract is not limited as to the time of its duration, it is terminable at the will of either party, upon giving a reasonable notice to the other. (*Outerbridge v. Campbell*, 87 App. Div. 597, 599, and cases cited; *Kenderdine Hydro-Carbon Fuel Co. v. Plumb*, 182 Penn. St. 463, 469.) As the former contract provided for a termination on a six months' notice, such notice would seem to have been considered by the parties proper and reasonable. The contract was lawfully terminated. The plaintiff had no right thereafter to sell or offer for sale any fluid ink eradicator under the name of S. S. Stafford's Ink Eradicator, he having expressly covenanted to that effect in the contract.

The defendant had the right to use its own name in its business, unless it had contracted otherwise. To hold that the defendant had agreed never to sell any fluid ink eradicator by the terms of the "fourth" subdivision of the contract renders the remaining provisions of the subdivision unnecessary and meaningless. But if the subsequent portion be read in connection with the first, it provides that the defendant agreed not to sell any fluid ink eradicator or any ink eradicator *in imitation* of the ink eradicator manufactured by the plaintiff or put up in similar boxes, forms or wrappers and labelled

with similar labels. The charge in the complaint is that the similarity is in the use of the name "Stafford's Ink Eradicator." No other similarity between the defendant's and the plaintiff's product is claimed. As there was no agreement by the defendant not to use the name and plaintiff has expressly agreed not to use such name, it follows that the complaint does not state facts sufficient to constitute a cause of action.

The interlocutory judgment will be reversed, with costs, the demurrer sustained and the complaint dismissed. This also calls for a reversal of the order granting the injunction, with ten dollars costs and a denial of the motion.

CLARKE, P. J., SCOTT, DOWLING and DAVIS, JJ., concurred.

Judgment reversed, with costs, demurrer sustained and complaint dismissed, with costs. Order granting preliminary injunction reversed, with ten dollars costs and disbursements, and motion denied.

MARGARET BURKE, Appellant, v. MARY J. HIGGINS,
Respondent.

First Department, July 13, 1917.

Ejectment — conveyance claimed to have been forged — evidence — transactions not with decedent but in his presence — when alleged grantee and purchaser on foreclosure is not mortgagee in possession so as to bar ejectment.

On an issue as to whether a deed from the plaintiff, under which the defendant claims, was the act of the plaintiff, or is a forged instrument as claimed by the plaintiff, it was error to exclude testimony of the plaintiff offered for the purpose of contradicting the testimony of witnesses for the defendant as to what took place at the execution of the alleged deed, upon the ground that the alleged grantee (since deceased) was present at the execution, if in fact he took no personal part in the transaction which was carried out between the plaintiff and a lawyer as agent of the grantee.

A transaction between a party and the agent of one deceased does not come within the purview of section 829 of the Code of Civil Procedure. Where the alleged grantee from the plaintiff bought in the lands on a subsequent foreclosure of a prior mortgage, the plaintiff not having been made a party to the suit, the purchaser did not become a mortgagee in

App. Div.]

First Department, July, 1917.

possession with the consent of the plaintiff so as to bar an action of ejectment by her, especially so where the purchaser conveyed to third persons who subsequently reconveyed to him and his wife as tenants by the entirety. This, because a mortgagee has no right of possession except by the consent of the mortgagor, which consent is deemed to be revoked whenever the mortgagee transfers his mortgage interest.

The aforesaid rule applies with special force where the defendant claims under an original deed which the plaintiff contends is a forged instrument. SCOTT, J., concurred in result, and PAGE, J., concurred with opinion.

APPEAL by the plaintiff, Margaret Burke, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Bronx on the 20th day of December, 1916, upon the verdict of a jury rendered by direction of the court after a special verdict had been received, and also from an order entered in said clerk's office on the 14th day of December, 1916, denying plaintiff's motion for a new trial made upon the minutes.

Charles Blandy, for the appellant.

John H. Corwin, for the respondent.

SMITH, J.:

The plaintiff claims under a deed from one John Higgins and others to the plaintiff under the name of Margaret Golden, of date January 23, 1903, the property being subject to a mortgage to the estate of Abraham Varick for \$4,300. The defendant claims under the said John Higgins by deeds of later date, claiming that upon October 21, 1903, this plaintiff reconveyed said premises to said John Higgins subject to the same mortgage of \$4,300. The question at issue and which was submitted to the jury was whether this paper purporting to be a deed from the plaintiff to John Higgins in 1903 was the act of the plaintiff or was a forged instrument. The plaintiff swore upon her own behalf that she had never signed a deed of the property, that the signature purporting to be her signature was not hers, and that she had not acknowledged it. Thereafter the defendant produced two witnesses, one the lawyer who drew the deed and who claimed to have taken the plaintiff's acknowledgment, and another

witness, one Nora Stanton, who swore to facts establishing the execution of the deed by the plaintiff. Thereafter the plaintiff was called back to the stand for the purpose of contradicting the stories told by these witnesses, and was not allowed to contradict them under the objection made that she was incompetent to testify under section 829 of the Code of Civil Procedure. The fact was that this transaction wherein the deed is claimed to have been signed by the plaintiff's mark, and not by her written signature, took place in the presence of John Higgins, although it does not appear that he took any part in the transaction. The deed was procured through the intervention of the lawyer, Schek, between whom and the plaintiff was the entire transaction. This evidence was, I think, competent evidence. If it had been excluded on the ground that the witness had already sworn that this signature was not hers, a different question might arise. But after the detailed testimony of the witness Schek and the witness Stanton, it was only fair to the plaintiff that she should be allowed to tell her version of the transaction, and notwithstanding John Higgins, the deceased, was in the room, inasmuch as he was in no way a party to the transaction except through his agent Schek. No authority is cited by the respondent to sustain this ruling, and no direct authority is found within this State to support the view here expressed. That the fact that the deceased was present during a transaction between a third party and the deceased's agent does not render the third party incompetent to swear to the transaction, seems to be held in *Denny v. Denny* (123 Ind. 240) and in *Dougherty v. Deeney* (41 Iowa, 19, 21). That a transaction between a party and the agent of the deceased does not come within the purview of the section is admitted by all the authorities, and it is difficult to see why the mere presence of the deceased person, taking no part whatever in the transaction, should alter the right of the party claiming under the deceased of giving testimony of such a transaction, especially when that testimony had already been given by the agent of the deceased who conducted the conversation in his behalf.

The main contention, however, of the respondent's brief seems to rest upon the claim that the defendant, upon the

App. Div.]

First Department, July, 1917.

plaintiff's own showing, is a mortgagee in possession with the consent of the plaintiff and that, therefore, an action in ejectment will not lie. This claim arises from the fact that after 1903 this Varick mortgage was foreclosed and Higgins bought in the property. In that foreclosure, however, the plaintiff was not made a party, and the defendant contends that, notwithstanding the foreclosure was upon the plaintiff's claim invalid as against the plaintiff, nevertheless Higgins acquired all the rights of the mortgagee, and inasmuch as his possession of the property was with the consent of the plaintiff, that Higgins became a mortgagee in possession, subject only to an equitable action to redeem, and not to an action of ejectment. If we assume that the purchase under a foreclosure void as to the plaintiff gave to Higgins the rights of a mortgagee, and if we assume that his possession was consented to by the plaintiff, it appears that thereafter and in 1911 Higgins and his wife conveyed this property to one Touhy, who upon the same day reconveyed to Higgins and his wife as tenants by the entirety, and both of these conveyances were subject to a mortgage in the sum of \$4,300 held by this same Varick estate. The record does not disclose whether the original Varick mortgage was allowed to stand, or whether a new mortgage to the same parties for the same amount was executed. In either case, Higgins could no longer be considered a mortgagee in possession. A mortgagee has no right to possession except by the consent of the mortgagor, and that consent must be deemed to be revoked whenever the mortgagee has transferred his mortgage interest, because the very reason why such a consent should be given has ceased. The plaintiff could not tender to Higgins or to his transferee the amount of the mortgage and demand possession, because neither Higgins nor his transferee has the mortgage interest.

As applied to the facts in the case at bar, the rule above stated has greater force, because the plaintiff never consented to the entry of Higgins or to his possession as mortgagee. He was in possession at the time he purchased under foreclosure of this Varick mortgage. His claim apparently was under this deed, which the plaintiff challenges as a forged instrument. Even before this deed Higgins had possession under no

apparent title except as tenant at will with obligation to surrender possession after due notice. The foreclosure of this mortgage and the purchase by Higgins of the property appears to have been without the knowledge of the plaintiff and under such circumstances that the defendant cannot be deemed to hold as a mortgagee in possession, directly within the case of *Barson v. Mulligan* (191 N. Y. 306). Under these circumstances, it would seem clear that the plaintiff may bring ejectment.

For the error, then, in the rejection of this evidence of the plaintiff, this judgment must be reversed and a new trial granted, with costs to appellant to abide the event.

DOWLING and SHEARN, JJ., concurred; SCOTT, J., concurred in result.

PAGE, J. (concurring):

The fact that John Higgins, through whom the defendant derived her title, was present in the room at the time it was claimed the deed was signed and acknowledged, and that John Higgins was dead at the time of the trial, did not render the plaintiff incompetent to testify by reason of the rule laid down in section 829 of the Code of Civil Procedure. Although the deed which it was alleged the plaintiff signed and acknowledged was to John Higgins as grantee, the fact of the signing and acknowledgment was testified to by the notary and attorney. It was not stated that John Higgins participated in that transaction. It was not, therefore, "a personal transaction or communication between the witness and the deceased person." The reason for the enactment of section 829 to prevent a party or one interested in the event giving testimony as to personal transactions or communications with a deceased person, is that the deceased cannot confront the survivor or give his version of the affair, or expose the omissions, mistakes or falsehoods of the survivor. Where the transaction was not with the deceased, but with a third person in his presence, it does not come within either the letter or reason of the section.

The judgment will, therefore, have to be reversed, unless the question of the execution of the alleged deed by the plain-

tiff to the defendant has become academic by reason of the possession by John Higgins of the premises subsequent to the foreclosure of the prior mortgage upon the premises, he having become a purchaser thereof at the foreclosure sale.

The questions necessarily to be determined upon this latter branch of the case are: Did John Higgins become a mortgagee in possession? And does the defendant succeed to his rights as such mortgagee in possession, and hence is she entitled to hold the property until the plaintiff redeems by paying the mortgage debt or such portion thereof as would be found due upon an accounting for the rents, issues and profits? If the plaintiff was the owner of the equity of redemption at the time the foreclosure action was brought (and for the purposes of this discussion it must be assumed that she was), the foreclosure as to her was void. Had the omitted party been other than the owner of the equity of redemption, the purchaser at the foreclosure sale would, as to that party, become a mortgagee in possession; but where the omitted party is the owner of the equity of redemption, it has been distinctly held that the purchaser at the sale under the judgment derives no title whatsoever, and the possession of the purchaser is because of an entry without lawful authority and amounts to a trespass. (*Herrmann v. Cabinet Land Co.*, 217 N. Y. 526, 529.) Therefore, the entry of John Higgins did not constitute him as to this plaintiff a mortgagee in possession by virtue of the deed given upon the foreclosure sale. }

It is claimed further, however, that he entered into possession with the consent and knowledge of the plaintiff, and that by reason thereof his possession will be held to be that of a mortgagee in possession; and it is true that "whenever it appears that the mortgagor has consented, either expressly or impliedly, by contract or conduct, to the entry of the mortgagee, for purposes, or under circumstances, not inconsistent with their relative legal rights under the mortgage, the possession of the mortgagee may properly be regarded as lawful. So, on the other hand, when the entry of the mortgagee is effected by the consent of the mortgagor under a relation that is hostile to, or inconsistent with, the legal

rights of the parties under the mortgage, then the mortgagee's possession must stand or fall without reference to his mortgage." (*Barson v. Mulligan*, 191 N. Y. 306, 322.)

It is not claimed that, with knowledge of their relation as mortgagor and mortgagee, the plaintiff actually consented to John Higgins' entry upon the premises. In my opinion, an implied consent cannot be spelled out from the circumstances of this case. Entry was not with her express consent, nor is it shown that at the time she had knowledge that Higgins' entry was claimed to be under the mortgage, but that his entry was hostile to and inconsistent with the rights of the plaintiff. He claimed to be in possession by virtue of the deed alleged to have been executed by the plaintiff and by virtue of the referee's deed of foreclosure. His entry, therefore, was hostile to plaintiff's title, and he has no right to possession as against the plaintiff until such hostile holding shall have ripened into a title by adverse possession.

For this reason I am of opinion that the judgment should be reversed and a new trial granted.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JAMES H. BRAND, Appellant, v. FRANCES HANAN BRAND,
Respondent.

First Department, July 13, 1917.

Husband and wife — annulment of marriage — temporary alimony and counsel fees.

The allowance of temporary alimony and counsel fees to the wife in an action to annul a marriage is to be determined, not alone by the husband's means, but by the wife's necessities. Thus, where it appears that the wife has an ample income of her own her motion for alimony and counsel fees should be denied.

APPEAL by the plaintiff, James H. Brand, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

App. Div.]

First Department, July, 1917.

York on the 24th day of March, 1917, granting defendant's motion for alimony *pendente lite* and counsel fee.

Sidney J. Loeb, for the appellant.

Henry J. Goldsmith, for the respondent.

SCOTT, J.:

The action is for the annulment of a marriage on the ground of the fraudulent concealment by the defendant of certain incidents in her life of such a nature as to justify the belief that if the circumstances had been known to plaintiff no marriage would have taken place. The defendant, rather unconvincingly, denies the truth of the charges made against her, and appears to place her chief reliance upon the separate defenses that the court has no jurisdiction of the action, and that plaintiff cohabited with her after he had learned the facts upon which he claims annulment. She also counter-claims and asks for a judgment of separation by reason of plaintiff's alleged cruelty.

The application for alimony was based upon defendant's estimate of plaintiff's means and resources founded in the main upon a statement of the expenses incurred by the parties while they lived together. The plaintiff's affidavit tends to show that defendant has over-estimated his means.

The important feature of the case, however, is that plaintiff shows that defendant has a settled income of no mean proportions, and has, or at least had not many months ago, a considerable sum of money in hand. If these allegations are true, and they are wholly undenied, defendant is in no need of either alimony or counsel fee to enable her to defend the action and support herself while it is pending. Under these circumstances no case was made out for an allowance of alimony *pendente lite* or of a counsel fee. (*Collins v. Collins*, 80 N. Y. 1; *Lake v. Lake*, 194 id. 179; *Earle v. Earle*, 147 App. Div. 930.) Many other cases might be cited to the same effect, all of which are authority for the proposition that an allowance for temporary alimony and a counsel fee is to be determined not alone by the husband's means but by the wife's necessities. If there be no necessity there should be no allowance.

The order appealed from must, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with leave, however, to defendant to renew the application, if so advised, upon other papers.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with leave to defendant to renew application upon other papers.

E. FOUGERA & COMPANY, INCORPORATED, Plaintiff, v. THE CITY OF NEW YORK and the DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Defendants.

CHARLES N. CRITTENTON COMPANY, a Corporation, Plaintiff, v. THE CITY OF NEW YORK and the DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Defendants.

HERMAN ROLFF PLANTEN, Trading under the Name and Style of H. PLANTEN & SON, Plaintiff, v. THE CITY OF NEW YORK and the DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Defendants.

First Department, July 13, 1917.

Public health — municipal corporations — Sanitary Code, city of New York — invalid provision that owners of proprietary medicines shall register ingredients with board of health — ordinance not ratified by Legislature — power of court to protect trade secret — regulation requiring person to give evidence against himself for use in criminal proceeding — police power.

While the department of health of the city of New York has power to enact a sanitary code, regulations made by it are open to attack on the ground of unreasonableness if they have not been specifically ratified by the Legislature. But a regulation enacted by the Legislature, or specifically ratified by it after enactment by the board of health, cannot be attacked upon the ground aforesaid.

Section 117 of the Sanitary Code adopted by the board of health of the city of New York and not ratified by the Legislature, which in effect requires manufacturers of proprietary or patent medicines either to print the formula of the medicine upon the package, or, if not so printed, to register the ingredients in the department of health where the informa-

tion is to be regarded as confidential and not open to inspection by the public or any persons other than the official custodian of said records and such persons as may be authorized by law to inspect the same, is invalid upon the ground of unreasonableness.

This, because the formula when kept as a trade secret is property which, in a proper case, may be protected by the court against an unauthorized disclosure, which is possible under the provisions of said Sanitary Code.

It seems, however, that it is not a valid objection to a law or ordinance properly within the scope of police power that its enforcement may incidentally injure or destroy a profitable business.

The court may declare said ordinance invalid although it relates only to the sale of medicines within the city of New York so that the proprietors of such medicines can deal freely elsewhere, for they are entitled to protection against even a partial interference with their business if unlawfully threatened.

As the purpose of said ordinance is to secure information upon which to base prosecutions for violations of the law forbidding the sale of certain habit-forming drugs, it is also invalid upon the ground that it requires a person to furnish evidence against himself for use in a criminal prosecution, it being admitted that, in the case at bar, the medicines of the plaintiffs contain no such ingredients in unlawful quantities.

The ordinance may be declared invalid upon the ground aforesaid even though some of the owners of the proprietary medicines are corporations.

SUBMISSIONS of controversies upon agreed statements of fact pursuant to section 1279 of the Code of Civil Procedure.

Charles M. Russell, for the plaintiff E. Fougera & Company, Incorporated.

George W. Wickersham, for the plaintiffs Crittenton Company and Planten.

Terence Farley and *John F. O'Brien*, for the defendants.

SCOTT, J.:

These three controversies all involve the same question, and are all submitted upon agreed statements of fact. The several plaintiffs are manufacturers or dealers in what are commonly known as proprietary or patent medicines, intended to be used internally. Many of these medicines have been in common use for years, so that their names have become familiar to the public. Their ingredients and the formulæ under which they are prepared are jealously guarded trade secrets and as such are considered to be of great value.

The judgment which each of these plaintiffs seeks is to

restrain the defendants from taking steps to enforce sections 116 and 117 of the Sanitary Code and the regulations adopted by the board of health to carry said sections into effect. It is conceded that the board of health has power to enact a Sanitary Code and that the sections above referred to, if valid, have all the force and effect of law. But while the board of health has authority to adopt sanitary ordinances, these particular sections of the Code have not been specifically ratified by the Legislature. They are, therefore, open to attack on the ground of unreasonableness, as they would not be if enacted by the Legislature, or specifically ratified by the Legislature after enactment by the board of health. (*Matter of Stubbe v. Adamson*, 220 N. Y. 459.)

Section 117, to which the plaintiffs particularly object, reads as follows:

"Sec. 117. Regulating the sale of proprietary and patent medicines. No proprietary or patent medicine manufactured, prepared, or intended, for internal human use, shall be held, offered for sale, sold, or given away, in the City of New York, until the following requirements shall, in each instance, have been met:

"The names of the ingredients of every such medicine, to which the therapeutic effects claimed are attributed, and the names of all other ingredients, except such as are physiologically inactive, shall be registered in the Department of Health in such manner as the Regulations of the Board of Health may prescribe.

"The expression 'proprietary or patent medicine,' for the purposes of this section, shall be taken to mean and include every medicine or medicinal compound, manufactured, prepared, or intended, for internal human use, the name, composition, or definition of which is not to be found in the United States Pharmacopœia or National Formulary, or which does not bear the name of all of the ingredients to which the therapeutic effects claimed are attributed, and the names of all other ingredients except such as are physiologically inactive, conspicuously, clearly, and legibly set forth, in English, on the outside of each bottle, box, or package in which the said medicine or medicinal compound is held, offered for sale, sold or given away.

" The provisions of this section shall not, however, apply to any medicine or medicinal compound prepared or compounded upon the written prescription of a duly licensed physician, provided that such prescription be written or issued for a specific person and not for general use, and that such medicine or medicinal compound be sold or given away to or for the use of the person for whom it shall have been prescribed and prepared or compounded; and provided, also, that the said prescription shall have been filed at the establishment or place where such medicine or medicinal compound is sold or given away, in chronological order according to the date of the receipt of such prescription at such establishment or place.

" Every such prescription shall remain so filed for a period of five years.

" The names of the ingredients of proprietary or patent medicines, registered in accordance with the terms of this section, and all information relating thereto or connected therewith shall be regarded as confidential, and shall not be open to inspection by the public or any person other than the official custodian of such records in the Department of Health, such persons as may be authorized by law to inspect such records, and those duly authorized to prosecute or enforce the Federal Statutes, the Laws of the State of New York, both criminal and civil, and the Ordinances of the City of New York, but only for the purpose of such prosecution or enforcement.

" This section shall take effect December 31, 1915." (See Cosby's Code Ord. [Anno. 1917] pp. 416, 417.)

It will be observed that this section requires, as to every proprietary or patent medicine held, offered for sale, sold or given away in the city of New York that the names of every ingredient, except such as are physiologically inactive, must either be made public by being clearly and legibly set forth in English upon the container in which the medicine is held, offered for sale, sold or given away, or that the names of all such ingredients shall be registered in the department of health. It is not required that the quantity of each ingredient shall be registered, nor the formulæ used in combining the several ingredients, but it is admitted by the agreed case

that "The disclosure to plaintiff's competitors of the names of the physiologically active ingredients of the preparations * * * might enable such competitors to ascertain therefrom the proportion of the said ingredients and the method of combining them; that there is a possibility that by the disclosure of the names of such ingredients to the Department of Health, such competitors may secure the information thus disclosed; and that the revealing of such information to plaintiff's competitors would probably result in great damage and injury to plaintiff's manufacturers and the business of plaintiff in which it and said manufacturers have invested a large amount of money."

It is to this possible, and as the plaintiffs argue probable, disclosure of the secret formulæ to their competitors that the several plaintiffs most seriously object. They insist that the proviso in the ordinance that "the names of the ingredients of proprietary or patent medicines, registered in accordance with the terms of this section, and all information relating thereto or connected therewith shall be regarded as confidential, and shall not be open to inspection by the public or any person other than the official custodian of such records in the Department of Health" and certain other persons in the public service, does not afford certain or adequate protection to their trade secrets, and it is admitted, by the clause quoted above from the agreed case, that complete protection cannot be assured if the ordinance be carried out. We may assume, therefore, that the enforcement of the ordinance will endanger and perhaps destroy the plaintiffs' trade secrets.

That such trade secrets are property, and are often very valuable property, and will in a proper case be protected by the courts against unauthorized disclosure, cannot be and is not denied (*Harvey Co. v. National Drug Co.*, 75 App. Div. 103; *Tabor v. Hoffman*, 118 N. Y. 30), and, under the concession contained in the agreed case, it is apparent that the enforcement of the ordinance may result in depriving the plaintiffs of their property by destroying the secrecy which alone gives value to their formulæ. This is claimed to be forbidden both by the Federal and State Constitutions.

The ordinance, however, if it can be sustained at all, must

be so sustained as a legislative exercise of the reserved police power of the State and it is not a valid objection to a law or ordinance properly within the scope of the police power, that its enforcement may incidentally injure or destroy a profitable business. (*Reinman v. Little Rock*, 237 U. S. 171; *Hadacheck v. Los Angeles*, 239 id. 394.) The ordinance under consideration does not compel plaintiffs, or any one else manufacturing or dealing in patent or proprietary medicines to make public their secret formulæ. It merely forbids them to hold or deal in the medicines within the city of New York without publishing or registering their therapeutic ingredients. As to all the rest of the world they are left free to deal with them as they see fit. The effect of the ordinance cannot be, therefore, to utterly destroy the secrecy of the formulæ, unless plaintiffs elect to run the risk. The enforcement of the ordinance need not, therefore, utterly destroy the value of plaintiffs' cherished trade secrets, but merely reduce the opportunity to derive profits therefrom. Still the plaintiffs are entitled to protection against even this partial interference with their business, if it is unlawfully threatened.

This brings us to a consideration of the question whether or not the ordinance is a valid exercise of the police power. As has frequently been recognized by judicial authority, it would be almost, if not quite, impossible to lay down a definite, final rule, applicable to all cases, as to the allowable extent to which the police power may be used. The general rule upon the subject is, however, fairly well defined. In *Lawton v. Steele* (152 U. S. 133, 137) it was said by Mr. Justice BROWN, speaking for the Supreme Court of the United States, that "It must appear, *first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." And in *Colon v. Lisk* (153 N. Y. 188) our own Court of Appeals, after quoting the foregoing with approval, stated the same rule in the following language: The court declared (p. 197)

"that a law passed under the guise of the police power must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law, and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the Legislature may use this power. [*Health Department v. Rector, etc.*, 145 N. Y. 32, 39.]"

The subject of the manufacture, distribution and use of medicines and drugs is a very common and very appropriate one for regulation under the police power of the State, and at first blush it might appear that the ordinance under consideration should be held valid because it deals with that subject, and we have no doubt that the purpose of the framers of the ordinance was to protect the public welfare by preventing the sale of fraudulent remedies as to which more is promised than can be fulfilled and which may in fact be actually harmful. Such a purpose is laudable and its accomplishment within the power of the law-making authorities. There remains the question, however, whether or not this particular ordinance is "calculated and appropriate to accomplish that end," and this question is open to judicial scrutiny. The plaintiffs claim that it is not calculated and appropriate to achieve the purpose desired. It is argued by defendants that where a remedy is offered for sale to the public with the representation that it is calculated to produce certain therapeutic results, those to whom it is offered should be informed what ingredients it contains from which such results may be produced. The plaintiffs answer this argument by pointing out that the ordinance is neither calculated nor apparently intended to give such information to the public because it contains provisions, possibly inadequate indeed, but apparently designed to prevent this information becoming publicly and generally disseminated.

Another entirely laudable object to be obtained by regulatory legislation respecting medical preparations is to prevent the sale and use, in a disguised form, of habit-forming drugs, but as to each of the proprietary medicines dealt in by these plaintiffs it is expressly stipulated as one of the facts of the

case, that they contain no ingredients in violation of the provisions of the health laws of the United States or of the State of New York, and no greater quantity, if any, of opium, or morphine, or heroin, or codeine or chloral or its salts, than is expressly permitted by the laws of the State of New York.

It is stipulated in the agreed statement of facts as follows: "XXVII. That the admitted object of defendants in the enactment of said revised Sanitary Code and regulations is to secure information on which to base prosecutions for violations of law, if in their opinion the facts disclosed in accordance therewith shall so warrant."

In view of this concession, coupled with that provision of the ordinance itself which provides that the registered certificate of ingredients shall be open to the inspection of "such persons as may be * * * duly authorized to prosecute or enforce the Federal Statutes, the Laws of the State of New York, both criminal and civil, and the Ordinances of the City of New York, *but only for the purpose of such prosecution or enforcement*," the plaintiffs strenuously argue that the ordinance is invalid, because it would force the persons required to file such certificate to furnish evidence against themselves for use in a criminal prosecution. (*People ex rel. Ferguson v. Reardon*, 197 N. Y. 236.) This appears to be a serious objection to the validity of the ordinance, for while it is true that the constitutional immunity from self-crimination does not extend to corporations, such as are two of the plaintiffs in these cases, the ordinance is not limited in its scope to corporations, but applies to natural persons, as well, if engaged in distributing proprietary or patent medicines, and we much doubt whether, if the ordinance is invalid as to individuals, it can be sustained as to corporations, for it is far from clear that the board of health intended, or would have been willing to so frame its ordinance as to make it inapplicable to one class of dealers in proprietary medicines, and applicable to others. (*James v. Bowman*, 190 U. S. 127; *Employers' Liability Cases*, 207 id. 463; *Hauser v. North British & Mercantile Ins. Co.*, 152 App. Div. 91; *affd.*, 206 N. Y. 455.) To make such a discrimination would not only be unjust, but would practically destroy the efficacy of the ordinance.

We have not overlooked the case of *Savage v. Jones* (225 U. S. 501) upon which defendants chiefly rely to uphold the attacked ordinance. That case upheld the validity of a statute of the State of Indiana which required every person dealing, in that State, in "concentrated commercial feeding stuff" for domestic animals, to file with the State Chemist a statement containing, among other things, the ingredients from which the article was compounded and the minimum percentage of crude fat and crude protein, and the maximum percentage of fibre contained in the article to be sold. (Ind. Acts of 1907, chap. 206.) The statute thus upheld, however, differed in some important particulars from the ordinance we are now engaged in considering, and these, as the plaintiffs argue, serve to differentiate that case from the present.

Finally the plaintiffs insist that the ordinance and the regulations adopted by the board of health to enforce it conflict with articles 4, 11 and 11a of the Public Health Law of the State, which deal rather broadly with the same subject dealt with by the ordinance in question here. (See Consol. Laws, chap. 45 [Laws of 1909, chap. 49], arts. 4, 11, 11a, as amd. by Laws of 1910, chap. 422; Laws of 1914, chap. 366, and Laws of 1915, chaps. 327, 502.)

Other objections are urged to the validity of the ordinance which it is unnecessary to discuss. For the reasons already stated we are of the opinion that the ordinance in its present form is legally objectionable and is invalid.

Judgment will, therefore, be entered in each case in favor of the plaintiffs therein as prayed for in the submissions, without costs.

CLARKE, P. J., LAUGHLIN, PAGE and DAVIS, JJ., concurred.

Judgment directed in each case in favor of plaintiffs as prayed for in the submissions, without costs. Orders to be settled on notice.

App. Div.]

First Department, July, 1917.

MORRIS J. FRANK and ISAAC N. GILBERT, Appellants,
Respondents, v. WALTER J. VOGT, Respondent, Appellant.

First Department, July 18, 1917.

**Contract — accord and satisfaction — acceptance of goods sold —
deduction of offset and payment by check for balance.**

Where the buyer of goods retained the same he became indebted for the purchase price and did not establish an accord and satisfaction as to a lower price by deducting the amount of an alleged offset because the goods were not up to the agreed quality and by sending a check for the balance to the seller who retained the same.

No accord and satisfaction was established by the transaction aforesaid although the buyer when sending the check wrote that he sent it in full payment.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the plaintiffs, Morris J. Frank and another, from a determination and order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of December, 1916, as amended by an order entered in said clerk's office on the 19th day of February, 1917, in so far as said determination and order reverses a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Seventh District, in plaintiffs' favor and dismisses the complaint upon the merits.

Appeal by the defendant, Walter J. Vogt, from so much of said determination and order of the Appellate Term as reverses the judgment of the Municipal Court in his favor, upon his counterclaim and dismisses the said counterclaim.

A. S. Gilbert [*Francis Gilbert and Godfrey Cohen* with him on the brief], for the plaintiffs.

Morris Blau, for the defendant.

SCOTT, J.:

There was clearly no accord and satisfaction disclosed by the evidence. Defendant had agreed to purchase merchandise at a fixed price. It was delivered to and retained by him.

He thereby became indebted for the purchase price. As against this he claimed an offset because some of the goods were not up to the agreed quality, and this he undertook to deduct from the purchase price, sending plaintiffs a check for the balance which was admittedly due in any event. Plaintiffs retained the check as they were entitled to do, and now sue for the remainder of the purchase price.

That this transaction does not constitute an accord and satisfaction is well established. (*Windmuller v. Goodyear Tire & Rubber Co.*, 123 App. Div. 424; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289; *Laroe v. Sugar Loaf Dairy Co.*, 180 id. 367; *Klinefelter v. Granger*, 136 N. Y. Supp. 485; *affd.*, *sub nom. Klinefelter v. Peterson*, 152 App. Div. 896.)

That defendant, when he sent the check, wrote that he was sending it as full payment does not affect the question. He could not by paying an amount admittedly due in any event, foreclose plaintiffs from claiming that more was due, nor yet subject them to the risk of postponing the payment of the whole claim, until defendant's relatively small counterclaim could be judicially liquidated. To hold otherwise would result, in many cases, in permitting a debtor to coerce his creditor into making an unjustified deduction from his bill.

The determination of the Appellate Term is reversed and the judgment of the Municipal Court affirmed, with costs to plaintiffs, appellants, in this court and the Appellate Term.

CLARKE, P. J., PAGE and DAVIS, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

I am of opinion that there was an accord and satisfaction. The plaintiffs had a claim against the defendant on an express contract for the sale and delivery of merchandise at a fixed price, but the defendant, evidently in good faith, claimed an offset on the ground that the goods delivered and received and retained by him were not of the agreed quality. The amount of the defendant's offset was clearly unliquidated for the plaintiffs did not concede that the defendant was entitled to any offset or deduction on account of the quality of the goods. In these circumstances the defendant sent the plaintiffs a check for the balance of the contract price of the goods

App. Div.]

First Department, July, 1917.

less the amount which he was willing to accept in settlement of the unliquidated offset or counterclaim without litigating the question upon condition that his check be accepted in full settlement. The check was received, retained and used by the plaintiffs and they brought this action to recover the balance of the contract price, which the defendant thus deducted under his claim of a right to an offset. It is not claimed by the defendant, as in *Windmuller v. Goodyear Tire & Rubber Co.* (123 App. Div. 424), upon which reliance is principally placed in the prevailing opinion, that there was an express agreement with respect to the amount which the defendant should be entitled to deduct if the goods were not of the agreed quality. In that case the defendant was not in a position to claim in the event of litigation that it was entitled to a greater deduction than it conceded by the settlement, for it made the deduction according to what it claimed was pursuant to an express warranty with an agreement with respect to the precise amount to be deducted in the event of a breach of warranty. Here if the settlement tendered by the defendant had not been agreed upon by the plaintiffs and they brought action the defendant might have claimed and shown a setoff or counterclaim greater than the amount which he deducted as a condition of the settlement. It seems to me, therefore, perfectly clear under all of the authorities that the acceptance and use by the plaintiffs of the defendant's check constituted an accord and satisfaction. (*Jackson v. Volkening*, 81 App. Div. 36; *affd.*, 178 N. Y. 562; *St. Regis Paper Co. v. Tonawanda Co.*, 107 App. Div. 90; *affd.*, 186 N. Y. 563; *Ravenswood Paper Mill Co. v. Dix*, 61 Misc. Rep. 235; *Brewster v. Silverstein*, 78 id. 123; *Dobbs v. Prudden-Winslow Co.*, 95 id. 250.)

I, therefore, vote for affirmance.

Determination reversed and judgment of Municipal Court affirmed, with costs to plaintiffs in this court and in the Appellate Term.

In the Matter of the Transfer Tax upon the Estate of MARY STEWART BIERSTADT, Deceased.

THEODORE F. HICKS and Others, [as Executors, etc., Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

First Department, July 13, 1917.

Tax — transfer tax — payment of tax under Federal Revenue Act of 1916.

Executors of an estate are not entitled to deduct from the gross estate, as an expense of administration, the estimated tax provided for in the Federal Revenue Act of 1916 before the amount of the transfer tax under the State law is fixed.

APPEAL by Theodore F. Hicks and others, as executors, from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 28th day of March, 1917, affirming a prior order fixing the transfer tax herein.

George A. Viehmann, for the appellants.

John B. Gleason, for the respondent.

SCOTT, J.:

Mary S. Bierstadt, who died on October 3, 1916, left a will by which she disposed of an estate valued at upwards of \$2,000,000. Of this estate she disposed of upwards of \$1,200,000, by legacies of specific sums, and gave the residue to certain named relatives. No complaint is made of the assessment of the property thus devised so far as concerns the taxability of the several transfers under the State Transfer Tax Law (Tax Law [Consol. Laws, chap. 60; Laws of 1909, chap. 62], § 220 *et seq.*, as *amd.*), except that the executors, appellants, claim that the tax to be paid under the Federal Revenue Act of 1916 (39 U. S. Stat. at Large, 777, chap. 463, tit. 2, § 201 *et seq.*), estimated to amount to \$97,309.58, should be deducted from the gross estate left by the testatrix, before the tax due under the laws of the State of New York is

App. Div.]

First Department, July, 1917.

calculated. This claim is based upon the proposition that the tax provided for in the Federal Revenue Act is a tax upon the estate, as such, and not upon the transfer of the property under the will and the laws of this State of which the deceased was a resident.

A similar claim for the deduction of the succession tax levied under the Federal War Revenue Act of 1898 (30 U. S. Stat. at Large, 464, chap. 448, § 29 *et seq.*) was decided adversely to the claimant in *Matter of Gihon* (169 N. Y. 443), wherein it was held that the Federal tax was not a tax upon the property transferred, but one upon the transfer itself, the amount of the tax being measured by the value of the property affected by the transfers. If, therefore, the tax imposed by the act of 1916 is, like that imposed by the act of 1898, a tax upon the transfer and not upon the property transferred, the claim of the executors was rightly denied. It is argued, however, that the Federal Revenue Act of 1916 differs radically from the War Revenue Act of 1898, in that under the act of 1916 the tax is imposed distinctly and unequivocally upon the property transferred, and that by no construction can it be held to be merely a tax upon the transfer of the property. Without expressing an opinion upon this construction of the act, it will suffice to say that if it must be construed as the executors claim that it must be, it would be invalid on constitutional grounds and no tax could lawfully be collected under it. (*Knowlton v. Moore*, 178 U. S. 41; *Matter of Gihon*, *supra*.) If so it would be clearly improper to deduct it from the gross estate before estimating the amount of the tax to be paid under the State law.

So, in either aspect of the law, whether it merely provides for a tax upon the transfer of the property, or provides for a tax upon the property itself which is transferred, the order appealed from is right. It is quite apparent that the executors will be confronted with serious questions which must be decided before they can safely proceed to finally distribute the estate. With those questions, however, we are not now concerned. All we are called upon to decide is that the executors are not entitled to deduct from the gross estate, as an expense of administration, the estimated tax provided for in the Federal

Revenue Act of 1916, before the amount of the tax under the State law is fixed.

The order appealed from is affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and DAVIS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

MORRIS OHLBAUM, Respondent, *v.* EDUARDO CORREA and Others, Appellants.

First Department, July 13, 1917.

Injunction — right to restrict use of trade name after surrendering right thereto to another.

A person, even after he has surrendered to another the right to use his name in business, still preserves sufficient interest in it to prevent its use by a stranger.

Hence, where one of two brothers who had the right by the dissolution of a partnership agreement to continue the business and use the firm name, dies and another person or corporation assumes the right to use said name, the other brother is entitled to injunctive relief against the stranger's appropriation of said name.

APPEAL by the defendants, Eduardo Correa and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of March, 1917, granting plaintiff's motion for judgment on the pleadings.

Phanor J. Eder, for the appellants.

Jerome F. Katz, for the respondent.

SCOTT, J.:

The pleadings upon which the motion was made are a complaint and a demurrer. The case made by the complaint is, that plaintiff and his brother Simon Ohlbaum were once copartners in business under the firm name of Ohlbaum

App. Div.]

First Department, July, 1917.

Brothers and as such became well and favorably known in the trade; that in 1909 the copartnership was dissolved, Simon Ohlbaum purchasing all of plaintiff's interest in and assets of the business. By the dissolution agreement it was stipulated that said Simon Ohlbaum should "have the right and privilege to continue said business under the old firm name of Ohlbaum Brothers." Simon Ohlbaum died in 1916, and since that time no person or corporation has acquired the right to use the name Ohlbaum Brothers; notwithstanding which, the defendants, no one of whom is named Ohlbaum, have used the name Ohlbaum Brothers as their trade name in carrying on business.

Upon this state of facts, admitted by the demurrer, we think that plaintiff is entitled to injunctive relief against defendants' appropriation of the name. Even after a man has surrendered to another the right to use his name in business, he still preserves sufficient interest in it to prevent its use by any casual stranger. Of course there may be circumstances under which the defendants can justify the use of the firm name in question. If these are alleged they will constitute a possible defense to the action. But no such circumstances are pleaded, and we may not call upon our imagination to supply them. All we have to consider is the complaint; and confining our attention solely to that, and not undertaking to anticipate any defense which may hereafter be pleaded, we think that the order appealed from is right.

The order should be affirmed, with ten dollars costs and disbursements to respondent, with leave to appellants to withdraw the demurrer and to answer within twenty days upon payment of all costs to the date of service of the answer.

DOWLING, SMITH, PAGE and SHEARN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to appellants to withdraw demurrer and to answer on payment of all costs to date of service of answer.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. KINGS COUNTY LIGHTING COMPANY, Relator, v. OSCAR S. STRAUS and Others, as Members of and Constituting the PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK, and the PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK, Respondents.

First Department, July 13, 1917.

Public service corporations — application by gas corporation for leave to issue and sell bonds for reimbursement of moneys expended from income — authority of Public Service Commission to dictate as to how money in treasury of corporation shall be disbursed.

Where, on an application by a gas corporation, under section 69 of the Public Service Commissions Law, for leave to issue and sell bonds to the amount of \$134,545.43 "for reimbursement of moneys expended from income or such other moneys in the treasury for the construction, completion, extension or improvement of its facilities, plant or distributing system," it appears that under the rate for depreciation adopted by the corporation the sum of \$48,209.16, claimed to have been expended from income for additions and improvements, was really expended out of the depreciation fund, an order of the Commission providing that such moneys "when so reimbursed to be used only to make good depreciation in the property of the company" should be modified by providing that out of \$134,545.43 allowed for reimbursements of moneys expended from income the sum of \$48,209.16 be used only to make good the said amount expended out of the depreciation reserve, or that, in the alternative, the total amount of bonds authorized for reimbursements be reduced by said amount.

The Public Service Commission has no authority to dictate as to how money in the treasury of a public service corporation shall be disbursed. If a corporation is actually entitled to issue bonds the Commission has no power to affix as a condition some act that it has no jurisdiction to compel; but it has power in an order granting consent to impose a condition based upon facts which justify the order with the condition.

CERTIORARI issued out of the Supreme Court and attested on the 16th day of December, 1916, directed to Oscar S. Straus and others, constituting the Public Service Commission of the First District of the State of New York, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceed-

ings had in connection with the application of the relator to issue certain bonds.

Samuel F. Moran, for the relator.

Oliver C. Semple, for the respondents.

SCOTT, J.:

The relator, a public service corporation supplying gas to a limited area in the county of Kings, applied to the Public Service Commission, First District, for leave to issue and sell a certain amount of long term bonds. After a hearing the prayer of relator's petition was granted, but was accompanied by conditions which relator was unwilling to accept. A rehearing was applied for, and had, and the Commission thereupon made the order now sought to be reviewed.

The only question raised is as to a condition or qualification attached to the Commission's consent to the issue of bonds to the amount of \$134,545.43, which was authorized to be issued "for reimbursement of moneys expended from income or such other moneys in the treasury for the construction, completion, extension or improvement of its facilities, plant or distributing system," the qualification or condition attached to the authorization of the issue of these bonds to which the relator objects is to the effect that such moneys "when so reimbursed to be used only to make good depreciation in the property of the company."

It appears from the evidence before the Commission and now brought up by the writ of certiorari that only a portion of the money expended for capital purposes, and for which it is sought to issue bonds, was derived from the depreciation account, the major part consisting of income. The result of the Commission's order will be, if enforced, to turn all this income into the depreciation account, and prevent its use for the lawful purposes to which income may be applied. This the relator claims is unauthorized. To pass upon this question requires a brief consideration of the creation of the depreciation fund.

Section 66, subdivision 4, of the Public Service Commissions Law (Laws of 1907, chap. 429; Consol. Laws, chap. 48;

Laws of 1910, chap. 480) authorizes the Commission to prescribe uniform methods of keeping accounts, records and books to be observed by gas corporations. The Commission adopted by an order of December 8, 1908, a uniform system of accounts which was applicable on and after January 1, 1909, for all gas corporations including this company. The requirements of the system of accounts have the force of law (*People ex rel. Bridge Operating Co. v. Public Service Comm.*, 153 App. Div. 129, 137.) At all events the relator accepted the order and acted under it and makes no complaint concerning it. This order for a system of accounts required that, when fixed capital is retired from service, depreciation applicable to the period after December 31, 1908, is to be charged to the depreciation reserve and that until otherwise ordered the amount estimated to be necessary to cover such depreciation month by month is to be based on a rule determined by the company, which rule may be amended. The relator filed a rule providing for the retention of eight cents per 1,000 cubic feet of gas sold and from January 1, 1909, to July 1, 1916, made its charges to operating expenses and its credit to accrued amortization of capital upon that basis. At the eight-cent rate, after taking care of its repairs and retirements, the amount in reserve accrued amortization of capital of the relator amounted December 31, 1915, to \$120,402.15. In August, 1916, the relator filed an amended rule from July 1, 1916, providing for a charge of eleven and one-half cents per 1,000 cubic feet of gas sold to the account of "General Amortization — Gas," and stated that this is not in excess of a proper charge for depreciation. It was not the practice of the relator to set aside in a specific fund any cash or securities representing this depreciation reserve, but instead the same appeared and was taken care of in the bookkeeping by deduction from its fixed capital.

On September 10, 1915, the relator made application to the Public Service Commission for the First District pursuant to section 69 of the Public Service Commissions Law authorizing an issue of \$675,000 of bonds, a part of said issue to be applied to the reimbursement of moneys actually expended prior to July 1, 1915, from income or from other moneys in the treasury of the relator and asked to be allowed

to make issue to the amount of \$545,000 for the future acquisition of property, the construction, completion, extension or improvement of its plant or distributing system. Upon the hearing it appeared that the relator had between June 1, 1914, and July 1, 1915, expended from income and from other moneys in its treasury \$134,545.43 for the acquisition of property and the construction, extension and improvement of its plant and distributing system. These expenditures, of course, added to the value of the fixed capital and, as it was the practice of the relator, as above stated, not to set aside any specific fund for depreciation but to cover the item by a bookkeeping charge which decreased the fixed capital, a certain part of this expenditure of \$135,368.84 represented depreciation. An analysis of the condensed balance sheets (Commission's Exhibit 5) shows that under the eight-cent rate for depreciation adopted by the relator, \$48,209.16 of this expenditure from income represented an amount charged to depreciation, spread over the accounts of the company and eventually showing only as a deduction from the value of the fixed capital. In other words, during the period in question the sum of \$48,209.16, claimed to have been spent from income for additions and improvements, was really spent out of the depreciation fund. While the sum comes from income in the first instance, it was, as a matter of bookkeeping, set aside to depreciation and, similarly, as a matter of bookkeeping, came out of the fixed capital, for, according to the rule filed by the relator, it was necessary, and it was its practice, to deduct from fixed capital the amount requisite, at the eight-cent rate, to represent the depreciation fund. Therefore, if the relator were to be permitted to issue bonds to reimburse it for these expenditures from income, including this sum of \$48,209.16, it would in effect be permitted to capitalize this depreciation fund and create an obligation of the company to that amount. This would be tantamount to permitting the relator to borrow money for the purpose of providing for a depreciation fund, a practice unsound in principle and one which not only nullifies the requirement for the creation of this reserve but which would ultimately lead a company into a serious financial condition. The Commission, therefore, was

naturally willing only to permit the treasury to be reimbursed by an issue of bonds on condition that such part of the proceeds as were equivalent to the sum spent out of the depreciation reserve should be restored to that reserve, and it coupled its permission with such a condition. It is quite true that the Commission has no authority to dictate as to how money in the treasury of a public service corporation shall be disbursed and that if a corporation is actually entitled to issue bonds the Commission has no power to affix as a condition some act that it has no jurisdiction to compel. Nevertheless, the Commission has power in an order granting consent to impose a condition based upon facts which justify the order with the condition. (*People ex rel. Binghamton Light, H. & P. Co. v. Stevens*, 203 N. Y. 7, 20.) That is to say, the Commission would have been compelled to deny the application to issue bonds to reimburse the treasury for money spent out of the depreciation fund, whereas it would have been not only justified but required to issue its consent if such had not been the fact. The moment the depreciation fund was made good to the amount required by the rule filed by the relator there was no objection to authorizing an issue of bonds to reimburse the treasury for any expenditure actually made from income. In other words, the condition was based upon facts which justified the order and without such condition the application must have been denied.

The trouble with the order, however, is that the Commission undertook to require the relator to apply to reserve out of this bond issue a much larger sum than \$48,209.16, namely, the entire amount of the expenditure from income between June 1, 1914, and July 1, 1915, amounting to \$134,545.43. The basis of this appears to have been that the relator had in 1915 filed its new rule of eleven and one-half cents for depreciation. It was apparently reckoned by the Commission that if this rule of depreciation had been applied since 1909 it would have required setting aside for depreciation this much larger amount. There was no legal justification for the Commission so doing. The company was entitled under the law to fix its own rule or rate of depreciation and it fixed the same at eight cents. In no event could the Commission, without taking an independent proceeding against the relator, in

App. Div.]

First Department, July, 1917.

which the relator would have notice and an opportunity to defend itself, make an order requiring it to change its whole system of accounting and put its depreciation charge upon some other basis than that adopted by the company under the law, and the earlier order of the Commission.

It follows, therefore, that the order of the Commission should be modified by providing that out of the \$134,545.43 allowed for reimbursements of moneys expended from income the sum of \$48,209.16 be used only to make good the said amount spent out of the depreciation reserve or that, in the alternative, the total amount of bonds authorized for reimbursements be reduced from \$134,545.43 to \$86,336.27.

CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred.

Order of the Commission modified as directed in opinion.
Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. WILLIAM J. BURNS, Appellant.

First Department, July 13, 1917.

Crime — taking and publishing letters or papers without authority in violation of Penal Law, section 553 — when private detective not liable for violation of statute — "publishing."

Where a banking firm, acting as fiscal agent of foreign countries and engaged in the purchase of munitions for them and in daily receipt of a large number of confidential cablegrams, discovered that so-called munition brokers, having desk room in a lawyer's office, were obtaining information as to the contents of said telegrams, and thereupon engaged the services of a licensed private detective, said detective, who, while in the lawyer's office for the purpose of installing a detectaphone, caused unsealed letters to the munition brokers by dealers in war munitions and certain other unsealed papers, copies of letters sent by munition brokers to dealers, to be copied in shorthand by his secretary and later transcribed and delivered to an employee of the banking firm which was prosecuting the inquiry, is not guilty of opening or publishing the letters or papers without authority in violation of subdivision 3 of section 553 of the Penal Law.

In order to violate said subdivision a person must both "take" a paper or a copy thereof and also "publish" it.

The delivery by the private detective of the copies of the letters to a single individual, his employer, who had a legitimate interest in knowing what use was being made of the information stolen from his office and who was not interested in giving general publicity to the facts did not constitute "publishing" within the meaning of the statute.

DOWLING, J., dissented, with opinion.

APPEAL by the defendant, William J. Burns, from a judgment of the Court of Special Sessions of the City of New York, Part VI, rendered against him on the 26th day of January, 1917, convicting him of violating subdivision 3 of section 553 of the Penal Law.

James M. Beck, for the appellant.

Robert S. Johnstone, for the respondent.

SCOTT, J.:

The defendant appeals from a conviction in the Court of Special Sessions of the crime of violating subdivision 3 of section 553 of the Penal Law.

The material facts disclosed upon the trial may be briefly summarized as follows:

In the latter part of 1915 and the early part of 1916 the banking firm of J. P. Morgan & Co., of the city of New York, was the fiscal agent in this country of both Great Britain and France, and in that capacity were engaged in making large purchases of munitions of war and other articles required by said foreign countries in the prosecution of the great war in which they are now engaged. In the course of this business they received daily a large number of cablegrams of a highly confidential nature, most of which were in code. At a certain time the firm became convinced that there was a leak somewhere in their office, and that outside persons, who had no right to do so, were obtaining information as to the contents of cablegrams received by the firm, and were dealing upon the information so obtained for their own advantage. The firm thereupon engaged the services of defendant, a duly licensed private detective, of much experience and of good repute, to ascertain how the information leaked out of their

office and by whom it was received and acted upon. It was soon discovered that the information was being used by four persons calling themselves "munitions brokers," and who occupied desk room in the offices of a firm of lawyers located in the Equitable Building, a large building in the city of New York. The main purpose of the inquiry was to learn from whom in the banker's office the information came, and to this end defendant leased an office next to the lawyers' office, and arranged with the superintendent of the building to gain access at night to the lawyers' office and to install therein a detectophone. While in the office on this errand, defendant found lying on a desk certain unsealed letters to one or other of the munitions brokers by dealers in war munitions, and certain other unsealed papers which were apparently copies of letters sent by the munitions brokers or one of them to said munitions dealers. While these papers did not serve to disclose who was furnishing the information from the banker's office, they did serve to disclose the use that was being made by the so-called brokers of the information obtained by them. It afterwards transpired that the information had been obtained by corrupting certain of the banker's clerks. Defendant did not remove any of the papers above described from the offices in which he found them, but caused his secretary, who accompanied him, to copy them in shorthand, and later to write them out in long hand or typewriting. These long hand or typewritten copies were delivered to one Egan, an employee of the banking firm, who had engaged defendant and was charged with prosecuting the inquiry. It does not appear that defendant communicated the contents of these papers to any other person, or that Egan made them public.

The statute under which defendant was convicted reads, so far as pertinent, as follows:

" § 553. Opening or publishing a letter, telegram or private paper. A person who wilfully, and without authority:
* * *

" 3. Takes a letter, telegram or private paper, belonging to another, or a copy thereof, and publishes the whole or any portion thereof; * * * Is guilty of a misdemeanor."

It is apparent that to violate this section a person must

both "take" a paper or a copy thereof, and must also "publish" it. To "take" without publishing, or to "publish" without taking, does not constitute a violation of this particular subdivision. Both of these words are subject to construction. If by "take" the Legislature meant asportation the defendant did not offend against the section in this particular, for he did not take any paper away, even temporarily. It would seem that the word must be thus construed for otherwise it would be inappropriate. It is true that making a copy is sometimes spoken of as "taking" a copy, but this is not the usual sense in which the word is used, and is wholly inapplicable to original papers.

The argument at bar, however, chiefly turned upon the meaning to be attached to the word "publish," for even if defendant did "take" the letter and copies he was not guilty unless he also published them. What he did was to deliver the copies to a single individual, his employer, who had a legitimate interest in knowing what use was being made of the information stolen from his office, and who was certainly not interested in giving general publicity to the facts. The question is whether or not this constituted "publishing" the letters and copies. We think not. The words used in criminal, as well as civil statutes, are to be given, as a general thing, the common, usual meaning, and in a criminal statute especially the words are not to be extended to cases not clearly within them. (*Sherwin v. People*, 100 N. Y. 351, 361; *People v. Nelson*, 153 id. 90, 94.) The word "publish" as commonly understood means to give to the public, and is usually associated with printing by pamphlet or newspaper. As was said in *United States v. Williams* (3 Fed. Rep. 484, 486): "The idea of publicity, of circulation, of intended distribution, seems to be inseparable from the term 'publication.'" Even a communication to a considerable number of persons, for a special purpose, is not always considered a publication. Thus business circulars, sent out only to persons engaged in or supposed to be engaged in the trade to which the circulars refer are not deemed publications (*New Process Fermentation Co. v. Koch*, 21 Fed. Rep. 580), nor is the representation of an unprinted play to persons especially selected considered a publication under the copyright laws. (*Keene v. Wheatley*,

App. Div.]

First Department, July, 1917.

14 Fed. Cas. 180, 199.) In the latter case the court said: "When the word 'publication' is used without an express qualification, a general publication is usually meant."

The learned district attorney insists that the word "publish" in the subdivision under consideration must be construed as it is construed in libel cases, and that the communication of the contents of a private paper to but a single person constitutes publication thereof. We see no reason, in the statute itself, for giving this very unusual construction, which is peculiar to the law of libel. Indeed the Penal Law (§ 1343) compels that construction in a prosecution for libel, but omits to do so in reference to the crime for which this defendant was convicted.

We are, therefore, of the opinion that defendant was not shown to have technically violated the statute under which he was convicted. In reversing his conviction, however, we must not be understood as commending or justifying his act in obtaining access by surreptitious means into the office occupied by the "munitions brokers," and in reading and copying papers which he found there.

All we are concerned with is whether or not he was legally convicted of the charge upon which he was tried. For the reasons above given we think he was not. The judgment of conviction is, therefore, reversed and the defendant discharged.

SMITH, PAGE and SHEARN, JJ., concurred; DOWLING, J., dissented.

DOWLING, J. (dissenting):

The inviolability of one's private papers from seizure or even inspection (save under due process of law) was declared as far back as *Entick v. Carrington* (19 Howell's State Trials, 1029), where plaintiff was given judgment against three messengers in ordinary to the King for entering his dwelling house, searching into his private books and papers and carrying away certain printed pamphlets and charts. Lord CAMDEN said therein:

"By the Laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can

set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

"According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

In *Boyd v. United States* (116 U. S. 616) Mr. Justice BRADLEY in discussing the case of *Entick v. Carrington* said: It "will always be celebrated as being the occasion of Lord CAMDEN's memorable discussion of the subject; * * * the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

And further (p. 630): "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the

App. Div.]

First Department, July, 1917.

privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction, of some public offence,— it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment." (See, also, *Weeks v. United States*, 232 U. S. 383, and *Flagg v. United States*, 233 Fed. Rep. 481.)

A consideration of the gradual growth of the statutory provisions in the State of New York for the protection of private letters and papers will show that the uniform tendency has been to enlarge the scope of the prohibited acts and not to restrict them. The earliest decision on the subject was rendered by the New York General Sessions in 1818 (*Noah's Case*, 3 City Hall Recorder, 13). It was there said (p. 20): "Upon these principles, and the best consideration we have been able to give this subject, the court is of opinion, that the breaking open and publishing a private letter is a misdemeanor, and therefore indictable.

"The correspondence by letter has become very extensive and important. Next to that of personal intercourse, it is a medium of communication the most general and interesting of any that exists in a civilized community. It may relate to matters of friendship, of business, and to all the concerns of human life, whether of a public or private nature. A letter is usually protected by a seal, to guard it against public inspection, and by the common consent of the world, this seal is held to be sacred. It is the interest of every man in the community, that it should be so, and to permit it to be violated with impunity, would lead to incalculable evils, and strike at the root of all public and private confidence.

"If, therefore, the proof in this case can support the charge that the defendant broke open this letter, or, which would amount to the same thing, if he had any agency, directly or indirectly, in doing it, in the opinion of the court, he ought to be found guilty. The direct evidence of the witnesses on the subject is, that it was found open on the floor of his office; but it is contended by some of the counsel for the prosecution, that there are circumstances which go to show

that he must have had an agency in procuring and breaking open the letter. If there be circumstances to satisfy you of this, according to the opinion we have expressed, the indictment would be sustained; otherwise, the defendant ought to be acquitted."

This decision was based on what were deemed settled principles of criminal law, though unsupported by any cited precedent. But this ruling was not deemed sufficiently broad to cure the evil of interference with private letters, and so in 1828 it was provided, to take effect on January 1, 1830, as follows (2 R. S. 695):

" § 27. If any person shall wilfully open, or read, or cause to be read, any sealed letter, not addressed to himself, without being authorised so to do, either by the writer of such letter, or by the person to whom it shall be addressed, he shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding one month.

" § 28. Whoever shall maliciously publish the whole or any part of such letter, without the authority of the writer thereof, or of the person to whom the same shall be addressed, knowing the same to have been so opened, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished as prescribed in the last section."

By chapter 871 of the Laws of 1867, section 27 was amended so as to read:

" § 27. If any person shall willfully open, read or cause to be opened or read, any sealed letter or telegraphic dispatch or message not addressed to himself, without the permission of the person to whom it shall be addressed or of the writer thereof, or other person having the right to give such permission, he shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by a fine of not less than three hundred dollars or imprisonment not less than three months, or both such fine and imprisonment. And any person who shall aid, abet or encourage the opening or reading of any such letter, telegraphic dispatch or message, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished as herein above provided."

By the same chapter the provisions of chapter 340 of the

App. Div.]

First Department, July, 1917.

Laws of 1850, relative to the disclosure of telegrams by employees of telegraph companies, were amended so as to bring within its provisions telegraphic dispatches or messages within the scope of section 27 before cited.

When the Penal Code was adopted in 1881 (Laws of 1881, chap. 676), the first two subdivisions of the present statute only were included (§ 642), and in their then form these did not refer to a "private paper" which was included within the statute by chapter 287 of the Laws of 1895, which also added subdivisions 3 and 4 of the present law. Subdivision 5 was added by chapter 588 of the Laws of 1900, and subdivisions 6 and 7 by chapter 441 of the Laws of 1905. We thus have the law in its present state. (Penal Law, § 553.)

There is no attempt to defend the action of this defendant. He arbitrarily and recklessly violated the rights of the persons into whose premises he secured admission by the exercise of some mysterious arts of suasion upon the representatives of the landlord, who in utter disregard of their duty to their tenant, allowed him to enter the latter's offices, for an unjustifiable purpose — the installation of a detectaphone therein — and took no steps to limit his trespass to even that wanton interference with the tenant's rights. Having secured admission to a private office, where he had no business to be, defendant availed himself of the opportunity to roam around and inspect the private papers, letters and telegrams which were left unprotected in the fancied security of the owner's private quarters. Having found some of the documents which apparently might interest his employers, he cynically proceeded to select those that suited his purpose and, having read them himself, dictated their contents to his stenographer Lynch, the process taking two or three hours, and Lynch then took his notes, transcribed them, turned the copies over to defendant and the latter delivered them to Mr. Egan, who was in the office of J. P. Morgan & Co. In this expedition defendant was accompanied by his son, whose connection with the matter appears to have been limited to unlocking a door, and by Bartlett Smith, a detectaphone installer, who testifies that defendant "opened the flat topped desk" in the office of Seymour & Seymour, took some papers out and started to dictate them to Lynch, after which

Smith went home. Lynch was not called as a witness. The course of action followed by defendant was absolutely defiant of the rights of all those with whose affairs he was meddling and seems to have been prompted by a belief that the importance of his employers would shield him from any disastrous consequences. It is fair to say that those employers do not appear to have had any knowledge of how far he proposed to go, though it was their representative who arranged to get him access to the offices in question, and they accepted the results of his operations without asking any questions as to how they were obtained. I cannot believe that it was ever the legislative intent to permit such acts as those of the defendant herein to escape punishment, because the papers he thus obtained were not made generally public by being spread broadcast in a newspaper or pamphlet. The evil which was sought to be prevented by the successive provisions of the statute was the violation of the right of privacy of one's private papers and letters. That power was never given to the King of England, to any of his officers, to the United States or any power, State, or any official of either or even to officers of the peace. Yet it was exercised in the case at bar by a private individual without color of official position but engaged solely on a private venture, and here that right was clearly violated by defendant when he made known the contents of the papers in question, first by dictation of their contents to Lynch and then by delivery of copies thereof to Egan. Thereafter the latter showed the copies to Prindle. Meantime Lynch had his stenographic notes of all the letters and papers. How many copies were made does not appear, but enough is shown, I think, to demonstrate that the statute was violated, and the papers in question were "published," using that word in its sense of making known what before was private. (*United States v. Williams*, 3 Fed. Rep. 484, 486.) Having in mind the purpose of the statute, I see no reason why a stricter construction should be given to the word "publish" as used therein than applies in the case of libel, where communication of the defamatory words to some person or persons other than the person defamed is sufficient to constitute publication. (Odgers Lib. & Sland. [5th ed.] chap. vi, p. 157; 18 Halsbury's Laws

App. Div.]

First Department, July, 1917.

of England, ¶ 1221; *People v. Bihler*, 154 App. Div. 618; affd., 210 N. Y. 592.)

I believe the judgment of conviction should be affirmed.

Judgment reversed and defendant discharged. Order to be settled on notice.

THADDEUS DAVIDS COMPANY, Appellant, v. THE HOFFMANN-LA ROCHE CHEMICAL WORKS, Respondent.

First Department, July 18, 1917.

Contract — option to cancel contract of sale under certain contingencies construed — effect of embargo by foreign countries on exportation of product.

A clause in a contract by a chemical company for the sale of carbolic acid, stating that "Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option," does not relieve said company from liability on the ground that foreign countries from which it obtained its supply of carbolic acid have placed an embargo on its exportation since the outbreak of the war, especially where the purchaser offers to accept domestic carbolic acid.

The reasonable construction of the contract is to be found by applying to it the rule *ejusdem generis*, and the words "fire, strike, accidents to our works or to our stock, or change in tariff" must be held to limit and qualify the "contingencies beyond our control" and to confine the happenings which would justify the cancellation of the contract to those of a like nature to the ones enumerated, which do not include an embargo.

APPEAL by the plaintiff, Thaddeus Davids Company, from an order and determination of the Appellate Term of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 6th day of October, 1916, reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in plaintiff's favor.

C. Parker Lattin [*Albert Ritchie* and *Charles H. Young* with him on the brief], for the appellant.

Otto V. Schrenk [*Hans H. A. Meyn* and *S. Ralph Tiffany* with him on the brief], for the respondent.

DOWLING, J.:

In December, 1913, plaintiff and defendant entered into a contract in writing, prepared by defendant and submitted by it to plaintiff, which accepted it without change. This contract was as follows:

" THE HOFFMANN-LAROCHE CHEMICAL WORKS,
" INCORPORATED.
" NEW YORK, December 22/1913.
* * *

" THADDEUS DAVIDS COMPANY,
" New York City, N. Y.:

" GENTLEMEN.--We herewith confirm the sale to you of the following:

" Quantity: Eleven Hundred Twenty (1120) Pounds.

" Article: Cryst. Carbolic Acid Roche USP.

" Price: 7½c per lb., inclusive 280 lb. drums.

" Terms: F.O.B. New York. Thirty days net, 1% 10 days.

" Delivery: Over the year 1914.

" Remarks: With protection against decline in price on any undelivered portion of this contract.

" Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option.

" Thanking you for your order, we are

" Yours very truly,

" THE HOFFMANN-LAROCHE CHEMICAL WORKS,
" Accepted Dec. 26/1913 C. P. SCHLICKE.
" THADDEUS DAVIDS Co.,
" J. W. R. MERCKLE, *Prest.*"

In May, 1914, under the contract plaintiff ordered one drum of crystals containing 280 pounds which it received and paid for. In November, 1914, it ordered another drum of the same weight and received only 100 pounds thereof and thereafter respondent delivered no more goods under the contract, though repeatedly called upon so to do. Finally, on January 21, 1915, defendant flatly refused to furnish any more goods under the contract, stating that the governments

of European countries, whence it obtained its supply of carbolic acid, had placed an embargo on its exportation, and none had been received from Europe since the outbreak of the war and its stock was exhausted. It then proceeded to say: "Under these circumstances, we are obliged to avail ourselves of the option provided for in our contract that the contract might be terminated by us in case of 'contingencies beyond our control,' as we can no longer supply any Carbolic Acid. We regret exceedingly that we are compelled to exercise this option, but prevailing conditions preclude any other course. You are, therefore, formally notified that the balance of the contract entered Dec. 22, 1913, amounting to 740 lbs. will not be supplied by us and that said contract is hereby cancelled." In reply to this plaintiff offered to take domestic carbolic acid, but defendant refused to supply even that at the contract price and again stated that it could not "recognize further liability under the contract." Upon the trial defendant stood upon the contention that the clause in the contract providing for cancellation in case of certain contingencies covered the results of the European embargo and gave it the absolute right to cancel the contract. Its claim is that an embargo may be considered in the same general class as a tariff; but if not, the rule *ejusdem generis* does not apply where the specific words stated in the clause exhaust the *genus* and that as the specific words used in the clause exhaust the two classes therein enumerated, the words "contingencies beyond our control" must be given a meaning outside of the classes mentioned. The defendant, by the contract which it framed, signed and submitted for plaintiff's acceptance, upon the acceptance thereof by the latter created a duty or charge upon itself which it was bound to perform, because it had promised so to do and had not shielded itself by proper conditions and qualifications. (*Cameron-Hawn Realty Co. v. City of Albany*, 207 N. Y. 377.) In the case at bar defendant had failed to provide in the contract against the contingency of foreign war and embargoes laid by foreign powers. An embargo cannot reasonably be likened to a change in a tariff. The former is a prohibition of exportation, and absolutely prevents the shipping of goods within its scope; the latter only affects the amount of import duty which the

dealer is obliged to pay. We think the reasonable construction of this contract is to be found by applying to it the rule *ejusdem generis*, and that the words "fire, strike, accidents to our works or to our stock, or change in tariff" (all of which events are or may be beyond the control of the parties) must be held to limit and qualify the "contingencies beyond our control," and to confine the happenings which would justify the cancellation of the contract to those of a like nature to the ones enumerated; which an embargo is not. We, therefore, believe that the cancellation of the contract by the defendant was unjustified and it is liable in damages therefor. The record is not entirely satisfactory as to the amount of damage which plaintiff sustained by reason of the breach, but there is some evidence, evidently given credence by the trial judge, which warrants the finding that on January 21, 1915, when defendant breached its contract and refused to deliver any more goods thereunder, the market price for carbolic acid crystals was one dollar per pound. This would have warranted a larger judgment than was awarded. The determination of the Appellate Term will, therefore, be reversed and the judgment of the Municipal Court reinstated, with costs to appellant.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concurred.

Determination reversed, with costs in this court and in the Appellate Term, and judgment of Municipal Court reinstated and affirmed.

CLARENCE W. GIESEN, Appellant, v. MAURICE W. METZLER, Respondent.

First Department, July 18, 1917.

Landlord and tenant — action for rent — defense — partial eviction.

Where, in an action under a written lease to recover the rent of a store, it appears that the tenant, although he had not rented the garret or stairway leading thereto, had been given the privilege of using the same, the fact that the landlord subsequently, upon rearranging the store, changed the means of access to the garret; but in no way disturbed the tenant's use thereof, does not effect a partial eviction of the defendant so as to constitute a defense to the action.

App. Div.]

First Department, July, 1917.

APPEAL by the plaintiff, Clarence W. Giesen, from a determination, order and judgment of the Appellate Term of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Bronx on the 1st day of February, 1917, affirming a judgment of the Municipal Court of the City of New York, Borough of The Bronx, Second District. An appeal is also taken from the judgment of affirmance of the Municipal Court entered in the office of said court on the 2d day of February, 1917.

Alton B. Parker [*Manfred W. Ehrich* with him on the brief], for the appellant.

Frederick M. Czaki [*Marion Erwin* with him on the brief], for the respondent.

DOWLING, J.:

This action was brought to recover the rent for the months of August and September, 1916, of the southerly store in the premises 2829 Third avenue, borough of The Bronx, city of New York, under a written lease between plaintiff's assignor and defendant, dated June 7, 1912, and expiring May 1, 1917. The defense upon which the tenant succeeded was that of a partial eviction, arising out of the following facts: Under the lease the demised premises were described as "the southerly store known as store south No. 2829 Third Ave., City and County of New York, Bronx Borough," which were "to be used and occupied for the sale of shoes and not otherwise," and these were the only premises which the landlord let and the tenant hired. But there was a later clause in the lease known as the 18th, providing as follows: "The Landlord agrees to permit the Tenant to use the garret of the herein demised premises for storage purposes as long as same does not affect the insurance on the building or cause the owners to receive any orders from the City or State Department relative to making repairs or alterations in said garret and the Landlord shall have the right to put out the Tenant's belongings from said garret at any time during the term of this lease without being liable for damages provided the insurance on the building is raised and the City or State Departments issue orders as heretofore stated." At the time

of the execution of the lease, and for some time thereafter, access to this garret was obtained by means of a stairway leading from the street to a hallway on the second floor and thence by another stairway to the garret. Thus defendant had free access to the garret from the street without passing through any other tenant's premises. Defendant testified that all the tenants had control of the locking and unlocking of the outer door. The garret was unfinished, with a sloping roof and the portion of it which defendant used was the half of it that was over his store. Defendant only used it to store his empty packing cases therein until they were sold. This condition of affairs lasted until July, 1916, when alterations were made in the building by which the stairway leading from the street was removed, the doorway into the street closed up, the space formerly occupied by both included within the limits of the northerly store in the premises, and such store then rearranged so as to constitute two stores, one of which was still occupied by Isaacs, the former tenant of the original northerly store. Then a new stairway was erected leading from the interior of Isaacs' store to the original platform on the next floor at which the stairway from the street formerly terminated, and from that access to the garret was obtained in the same way as before. Thus defendant no longer would have had free access to the stairway leading from the street level without the consent of Isaacs. But simultaneously with the making of these changes Isaacs gave his consent, both in writing and verbally, that Metzler go through his store to bring shoe cases or boxes up or down to or from the garret until the termination of defendant's lease. Of these consents Metzler was fully advised. Isaacs' lease had a much longer term to run than defendant's. Defendant remained in possession of his store, and does not attempt to show that he could not have used the garret with as much freedom as before the changes were made. He never was refused admission to the garret, or entry or passage through Isaacs' store, or found the store closed when he wished to bring or remove boxes. On this record he had the privilege of using the garret as fully as before, except that his employees had to walk a slightly greater distance to reach the first stairway and to pass through a store in so doing. Defendant's

App. Div.]

First Department, July, 1917.

position seems to be that he was entitled to use the same stairway to gain access to the garret, throughout his lease, and that when the means of reaching the garret were changed, even though his access thereto was not affected, he could retain possession of the store, use the garret and still not pay any rent. The answers to his claim are (1) that he never hired any stairway nor the garret, nor did the landlord lease either to him; all he had was a privilege of using the garret, which included the use of any means of access thereto, but not of any particular or special means of access, nor necessarily of those then in existence; (2) that the landlord furnished a safe, proper and adequate stairway in substitution for the one which was removed and defendant was licensed and authorized to reach and use the same during the full term of his lease by the tenant of the store wherein such stairway was located, while above that floor the method of reaching the garret was as before; (3) that defendant's use of the demised premises and his exercising the privilege of storing his empty cases in the garret were in no way disturbed, abridged or affected by the change in the location of the stairway, coupled with Isaacs' permission to him to go through the northerly store; (4) that there was, therefore, no partial eviction of defendant, his defense was not sustained and judgment should have been given in favor of plaintiff.

The determination and judgment appealed from will, therefore, be reversed, with costs, and judgment directed in favor of plaintiff in the sum of \$450, with interest and costs.

CLARKE, P. J., SCOTT, PAGE and DAVIS, JJ., concurred.

Determination and judgment reversed, with costs in this court and in the Appellate Term, and judgment directed in favor of the plaintiff in the sum of \$450, with interest and costs.

WILLIAM F. BEHRMANN, as Substituted Trustee under the Trust Agreement of FANNIE CLARKSON with DANIEL E. SEYBEL, Appellant, v. FREDERICK W. SEYBEL and WILLIAM A. KNAPP, as Executors, etc., of DANIEL E. SEYBEL, Deceased, and Others, Respondents.

First Department, July 13, 1917.

Fraud — trust — assignment by trustee of bond and mortgage — consideration — rights of purchaser without notice of prior equitable rights — maxim — where equities are equal the law shall prevail.

A law firm engaged in loaning money on bond and mortgage and purchasing and selling real estate and securities formed a mortgage company and whenever it purchased property for clients title thereto was taken in the name of said company, the latter issuing at the time certificates showing the interest of the clients in the particular property. A client gave to a member of the firm cash and securities including a bond and mortgage in trust to invest and reinvest the same and with power to sell. The mortgage company to which said mortgage had been made executed and issued to the member of the firm as trustee for the client a certificate stating that it had sold the bond and mortgage to said member, as trustee for the client, and agreeing upon the surrender of said certificate to deliver an assignment, but the assignment was never executed and interest was paid by the firm to the client. Thereafter, the member of the firm caused the mortgage company to execute and deliver a similar certificate to a second client who had money on deposit with the firm for investment and the account of said client with the firm was charged with the value of the bond and mortgage and the firm member's account as trustee of the first client was credited with the same amount. Thereafter the second client decided to transfer her account to a trust company, and the mortgage company executed and delivered an assignment of the bond and mortgage to said client which was turned over to the trust company.

Held, on all the evidence, that the second client paid a valuable consideration for the assignment of the bond and mortgage and has a right to retain them as against the first client;

That the first client is entitled to recover from the executors of the partner her share in another mortgage held by said partner, and that said share shall be assigned by the mortgage company to the purchaser thereof.

A *cestui que trust* is not to be debarred from following property which her trustee has stolen or given away without consideration merely because by appointing him trustee she placed him in a position to defraud her.

A purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the real estate at the time of his purchase is entitled

App. Div.]

First Department, July, 1917.

to priority in equity as well as at law, according to the well-known maxim that where the equities are equal the law shall prevail.

SCOTT, J., and CLARKE, P. J., dissented in part, with opinion; SHEARN, J., dissented in part, with opinion.

APPEAL by the plaintiff, William F. Behrmann, as substituted trustee, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Bronx on the 17th day of July, 1916, upon the decision of the court after a trial before the court without a jury.

William A. Keating, for the appellant.

Ira B. Stewart, for the respondent Union Trust Company of New York, as executor, etc.

Eliot Tuckerman, for the respondent Alexander M. Welch, as executor, etc.

DAVIS, J.:

This action is brought, *first*, to compel an accounting by the executors of Daniel E. Seybel, for the purpose of ascertaining the amount of money justly and equitably due to the plaintiff from the estate of Daniel E. Seybel; *second*, to compel the defendant Union Trust Company, as executor of Mary J. Alker to assign to the plaintiff a certain bond and mortgage for \$6,000 made by Leon Noel to the Park Mortgage Company, and for a judgment decreeing that the defendant Park Mortgage Company pay to the plaintiff such part of the \$6,000 as would represent that part of the mortgage which the executor of Mary J. Alker failed to transfer to the plaintiff; *third*, to compel the Park Mortgage Company to assign to the plaintiff \$200 of the mortgage of John Kitson Wright and wife, made to the Park Mortgage Company, and *fourth*, to trace the moneys alleged to belong to the plaintiff for the purpose of declaring that the property represented by the money be impressed with a trust in behalf of the plaintiff.

The court at Special Term dismissed the complaint against the executor of Mary J. Alker, and the defendant Welch, as executor, on the merits and rendered judgment in favor

of William F. Behrmann, as substituted trustee of Fannie Clarkson, against the executors of Seybel for \$6,000, and for the further sum of \$200, which latter amount was the consideration received by Seybel from the Dyckman estate for the purchase of Fannie Clarkson's share of the Wright mortgage. The judgment also directed that the defendant Park Mortgage Company execute and deliver to the defendant Welch, executor of Isaac M. Dyckman, an assignment of the \$200 interest in the Wright mortgage.

Daniel E. Seybel, for some time prior to 1910, was a member of the law firm of Silkman, Fettretch & Seybel. This firm did a large business in the purchase and sale of real estate, loans of money on bond and mortgage, and in purchasing and selling bonds and mortgages. An important part of their business consisted in investing the moneys of clients intrusted to it for that purpose. In order to carry on the business most conveniently for themselves and their clients, the firm organized the Park Mortgage Company. Whenever it purchased real estate or mortgages for clients, the title thereof was taken in the name of the Park Mortgage Company, the latter issuing at the time certificates showing the interest of the clients in the particular property. The corporation was in the absolute control of the members of the firm, they being the officers and directors, and Seybel being the controlling member of the corporation. The corporation kept no bank account and had no money of its own, nor did it keep any books. The moneys of the clients were kept in the firm's bank account and the transactions with the clients were recorded in the firm's books, and statements of the transactions were rendered to the clients in the firm name. The ownership of the various mortgages was shown in a book kept by the firm and known as the mortgage book. In this book were entered the names of the owners of the mortgages with a full description of the security.

Silkman died in 1910 and the business was continued by the new firm of Fettretch & Seybel. Fettretch having died in 1912, the business went on with the new firm of Seybel & French and was continued by that firm until the death of Seybel, on May 4, 1915.

The plaintiff Fannie Clarkson, now Mrs. Behrmann,

App. Div.]

First Department, July, 1917.

and Mary J. Alker were both clients of Seybel's firm and each intrusted to it money for investment. Mr. Seybel had full charge of these investments, and it was he who decided into what securities the money should be placed.

The claim of the plaintiff has its origin in the following circumstances: Seybel had been executor of the estate of James Clarkson, deceased, who was the father of the plaintiff. In June, 1911, Seybel, through the American Audit Company, prepared an account of his proceedings as said executor and submitted it to the plaintiff for her examination and approval. Having examined the account she executed and acknowledged a receipt and release by the terms of which she acknowledged the receipt from Daniel E. Seybel of \$7,343.58 in cash and securities in full payment and satisfaction of her one-fifth share of the residue of the estate of her father. This receipt states that it is taken as a full discharge of Seybel to account and that she had examined the account, covering a period from September 7, 1893, down to and including June 1, 1911.

Simultaneously with the execution of the receipt and release Fannie Clarkson executed an instrument giving and granting unto Seybel and his successors, \$7,000 in cash and securities, in trust, to invest and reinvest the same upon bond and mortgage, upon property in the State of New York, and upon such other securities as trustees are permitted to invest in under the laws of the State of New York. Seybel was also authorized to receive the rents, income and profits from such investments and to pay over the net amount to Fannie Clarkson during her life. At her death the principal sum or the securities remaining in his hands were to be given to such persons as she might appoint by her last will. The instrument then provides for the disposition of this fund in case Miss Clarkson made no appointment by will. The instrument also empowers Seybel and his successors to sell and convey any real property which may be purchased by him upon the foreclosure of any mortgage investment and to give and deliver deeds thereof.

Among the assets appearing in Seybel's account of proceedings as executor of Miss Clarkson's father, was the bond and mortgage of Leon Noel for \$6,000. It represented part

of the \$7,343.58 belonging to Fannie Clarkson as her share of her father's estate. It was, therefore, part of the trust fund passing to Seybel under the deed of trust. The mortgage in question was made by Leon Noel to the Park Mortgage Company in 1904. On the same date that the deed of trust was executed, the Park Mortgage Company executed and issued to Seybel, as trustee for Fannie Clarkson, a certificate stating that it had sold to Daniel E. Seybel, as trustee for Fannie Clarkson, the Noel bond and mortgage for \$6,000, and agreeing that, upon the surrender of the certificate and on demand of the person entitled to the bond and mortgage, it would deliver an assignment of the bond and mortgage. This certificate was signed by "Park Mortgage Company, by Daniel E. Seybel, Treasurer." The bond and mortgage were never assigned to Fannie Clarkson or to her trustee, Seybel, but interest thereon was paid by Seybel's firm to Fannie Clarkson down to December 26, 1914.

When this certificate was issued it was pinned to the bond. The bookkeeper of Seybel's firm testified that when a mortgage was transferred in this way, it was the practice of the firm to have the Park Mortgage Company issue a certificate and pin it to the bond. He also testified that the various clients who dealt with the firm were aware of this practice and that they were told that their interests were being taken care of in this particular way and knew that the bonds and mortgages were held in the name of the Park Mortgage Company and not in any other name, one of the purposes of this practice being to evade the paying of personal tax.

On the books of the law firm there was an account entitled Daniel E. Seybel, trustee for Fannie Clarkson. This account carries the Noel mortgage and the various payments of interest made to Fannie Clarkson.

It thus appears quite conclusively that Fannie Clarkson conferred upon Seybel as her trustee power to sell the Noel bond and mortgage. It is quite true that the Park Mortgage Company did not make a formal assignment of the bond and mortgage to Seybel as trustee. It simply issued the certificate referred to. Nevertheless, Seybel controlled the situation and had the right under the deed of trust to him to adopt whatever method he pleased to sell the bond and mortgage for the

App. Div.]

First Department, July, 1917.

benefit of Miss Clarkson. He made such a transfer by causing the Park Mortgage Company to execute and deliver an assignment of the bond and mortgage to Mary J. Alker under the following circumstances: Mary J. Alker had been a client of the law firm for several years and at one time had placed in the possession of the law firm about \$50,000 for investment on her account. On December 26, 1914, she had a balance of about \$16,500 in the hands of the firm for investment and was entitled to this money at any time.

On the latter date, Seybel, as trustee of Fannie Clarkson, caused the bond and mortgage to be transferred to the account of Mary J. Alker, the Park Mortgage Company issuing a certificate to Mary J. Alker in form similar to that formerly issued to Daniel E. Seybel as trustee of Fannie Clarkson. At the same time, the account of Mary J. Alker with the firm was charged with the bond and mortgage and Seybel's account, as trustee of Fannie Clarkson, was credited with \$6,000, the amount of the mortgage. The parties stipulated at the trial that on the 26th of December, 1914, the firm of Seybel & French had in their hands uninvested funds of Mrs. Alker amounting to more than \$6,000, part of which was the proceeds of a mortgage which had been paid off May 19, 1914. It was also stipulated that a finding to that effect be made by the court, and that finding was made. Under the circumstances of this case it cannot be said that Seybel caused the Noel mortgage to be transferred to Mrs. Alker to pay an antecedent debt. In March, 1915, Mrs. Alker decided to transfer her account from Seybel & French to the Union Trust Company. Accordingly, a representative of the trust company called upon the firm and arranged to have the account turned over to the trust company. At this time the Noel bond and mortgage was still in the name of the Park Mortgage Company, the evidence of Mrs. Alker's ownership thereof being the certificate issued by the mortgage company on December 26, 1914. Thereafter, the Park Mortgage Company executed and delivered an assignment of the Noel bond and mortgage to Mary J. Alker and this bond and mortgage with other property was turned over to Mrs. Alker's representative and her account with the firm of Seybel & French closed. It is claimed by the plaintiff, among other things,

that this assignment was without consideration and in fraud of the plaintiff's rights.

It thus appears that the plaintiff and Mrs. Alker stood in somewhat different positions with reference to the sale of the Noel bond and mortgage. In the first place, the sale was made possible by the plaintiff. There is no doubt that under the deed of trust to Seybel he had full power to make the sale to Mrs. Alker. Moreover, the plaintiff never took the trouble to ascertain if the bond and mortgage had been assigned to her trustee Seybel. The result was to permit the legal title to remain in the Park Mortgage Company, and she is properly chargeable with the consequences naturally flowing from this omission. One of the consequences was to permit Mrs. Alker to take the assignment of the Noel bond and mortgage directly from the Park Mortgage Company with no indication that it was trust property. There is nothing in the record to show that Mrs. Alker had any knowledge of any private arrangement between the plaintiff and Seybel, and when she took over the assignment of the bond and mortgage from the Park Mortgage Company there was nothing in the transaction to make her suspect that they were the property of the plaintiff or her trustee. Had she been made aware of that fact and then made an inquiry as to the power of the trustee to sell, she would have discovered that the plaintiff over her own signature had conferred full power upon the trustee to make the sale. Having made the inquiry, she would have met the full measure of her duty as a purchaser and would be protected in taking the assignment. (*Spencer v. Weber*, 163 N. Y. 493, 502.)

I think it is clear that Mrs. Alker was a *bona fide* purchaser of the bond and mortgage, without notice of any infirmity inherent in the transaction. It remains to inquire whether she gave any consideration for the assignment. The financial transactions with both Mrs. Alker and the defendant were carried on through the firm of Seybel & French, the latter giving the firm checks in settlement of income accounts with these clients.

When the Noel bond and mortgage were assigned to Mrs. Alker, she had on deposit with the firm for investment more than the amount of the bond and mortgage. Her account

App. Div.]

First Department, July, 1917.

with the firm was then charged with the amount of the bond and mortgage, and the account of Seybel, as trustee, was credited with \$6,000. It may be contended that these were merely bookkeeping entries and were meaningless. It is nevertheless a fact that in banks, trust companies and other business houses, property is effectually transferred every day in this manner. And in the case at bar these entries had the effect of taking out of the account of Mrs. Alker a credit of \$6,000, which, up to that time, had been subject to her call, and her account with Seybel & French was settled finally on that basis. The substance of the transaction was the payment by Mrs. Alker to the trustee of the plaintiff of the sum of \$6,000 in return for the Noel bond and mortgage, she having at the time more than \$6,000 on deposit with Seybel & French for investment.

For these reasons I think Mrs. Alker paid a valuable consideration for the assignment of the bond and mortgage and has a right to retain them as against the plaintiff.

The result arrived at would not be changed even if the trustee intended to commit a fraud in the transaction. The fraud, if any, was made possible and easy by the plaintiff's relinquishment of control over her property and by her failure to require that the bond and mortgage be held in the name of her trustee. Where one of two innocent parties must suffer through the fraud of a third party, he whose act made the fraud possible must bear the consequences. (*Yeoman v. McClenahan*, 190 N. Y. 121, 127; *Kirsch v. Tozier*, 143 id. 390, 395.)

Finally, Mrs. Alker's executor holds the legal title to the bond and mortgage in question and the case comes within the equitable doctrine referred to in *Perry on Trusts* (6th ed. § 218) where the author says: "And it may be added that nothing is clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well known maxim that *where equities are equal, the law shall prevail.*"

The court has decreed that the \$200 share of the Wright mortgage shall be assigned by the Park Mortgage Company

to the Dyckman executors, and that Fannie Clarkson recover of Seybel's executors \$200.

Fannie Clarkson originally owned the \$200 share in the Wright mortgage, but it was never assigned to her by the holder, the Park Mortgage Company, nor did the latter issue to her the usual certificate of ownership. It appeared, however, on the books of Seybel & French in the account of Seybel as trustee under date of December 1, 1911, as the property of Fannie Clarkson and she received the firm's check for interest thereon down to October 22, 1914. On October 22, 1914, Seybel, as one of the executors of Dyckman, bought the Wright mortgage, then reduced to \$1,700, for the Dyckman estate, giving therefor a check for \$1,748.45 drawn to the order of Seybel & French by himself as executor of Dyckman. This check was deposited in the firm's account and by entries in the firm's books the amount of the check was distributed among the accounts of those clients who appeared by the books to be owners of the participating shares of the Wright mortgage. Two hundred dollars were thus credited to the account of Fannie Clarkson as having been received from the executors of Dyckman. Entries were also made apportioning the interest then due. Thereafter interest on the Wright mortgage was paid to the Dyckman estate. It thus appears that the Dyckman executors gave full value for the share of Fannie Clarkson in the Wright mortgage, that they bought it from one upon whom she had conferred full power to sell and the transaction was carried through upon the books of Seybel & French in a manner with which she was acquainted and in which she must be held to have acquiesced.

The judgment of the Special Term should be affirmed, with costs.

LAUGHLIN, J., concurred; CLARKE, P. J., and SCOTT, J., dissented.

SHEARN, J. (concurring):

I agree with the opinion of Mr. Justice DAVIS with the exception of the statement therein "The fraud, if any, was made possible and easy by the plaintiff's relinquishment of control over her property and by her failure to require that

App. Div.]

First Department, July, 1917.

the bond and mortgage be held in the name of her trustee." In this particular I agree with Mr. Justice SCOTT that a *cestui que trust* is not "to be debarred from following property which her trustee has stolen or given away without consideration, merely because by appointing him trustee she put him in a position to defraud her." In my opinion the case turns upon the application of the maxim that where the equities are equal, the law shall prevail.

SCOTT, J. (dissenting):

I am strongly of the opinion that the judgment appealed from is wrong and should be reversed. It is one of the conceded facts in the case that the Noel mortgage, although held in the name of the Park Mortgage Company, was the property of James Clarkson, when he died and was allotted to Miss Clarkson, now Mrs. Behrmann, as a part of her share of his estate. When she executed the deed of trust to Seybel, the mortgage was transferred to him as a part of the trust fund and he thereafter held it as trustee.

Seybel went through the form of procuring a certificate of title thereto from the Park Mortgage Company, the record holder. If James Clarkson, the former owner, held an assignment from the mortgage company, it may be assumed that Seybel, who was both the executor of Clarkson and the trustee of plaintiff, surrendered the former certificate issued to Clarkson. At all events, however the details of the transaction were carried out, we may start with the trust deed to Seybel and the paper issued to him by the Park Mortgage Company. That paper deserves consideration. It is executed under the seal of the company, and certifies that it (the company) has "this day sold D. E. Seybel, as trustee for Fannie Clarkson, the bond of Leon Noel for six thousand dollars * * * secured by mortgage, covering premises 239 Van Cortland Park Avenue, Yonkers, N. Y." Then follows an agreement that the mortgage company will, on demand and the surrender of the certificate, deliver a formal assignment of the bond and mortgage such as could be recorded, or will, on like demand and surrender, execute and deliver a satisfaction piece.

By this instrument the Park Mortgage Company parted with all its beneficial interest in and all its actual title to the

debt evidenced by the bond and the mortgage given to secure it. The bond it had parted with absolutely, as its certificate states, and of course the right to the possession of the security followed the ownership of the debt, and after the completion of the transaction evidenced by its certificate the Park Mortgage Company had no title or interest in either the debt or the mortgage which it could lawfully sell or assign to any one, except D. E. Seybel as trustee, unless the certificate issued to him was surrendered and canceled as does not appear to have been done, or the debt, by some other means, retransferred to the mortgage company.

When, therefore, the Park Mortgage Company, later, undertook by a like certificate to sell the same bond to Mary J. Alker, it undertook to sell what it no longer owned, because it had already sold it to another person and had never reacquired it. On the face of the documents, therefore, without considering the relations of Seybel to the mortgage company and his domination of its business, Mrs. Alker never acquired any title to the Noel bond, because her only pretended title thereto was by a sale from a vendor who had already parted with all title to it and could not make a valid sale. The right to the mortgage, of course, followed the ownership of the debt, and as Mrs. Alker never acquired title to the bond, she had no right to an assignment of the mortgage, and the unauthorized formal assignment of the bond and mortgage to her by the mortgage company added nothing to her title, as between herself and plaintiff. But if we overlook, as was done at Special Term, the inability of the mortgage company to make a valid sale of that which it had already sold to another, and treat the transaction as if Seybel, as trustee, had transferred a part of the trust estate to Mrs. Alker, the judgment would still be wrong. The situation as it stood upon this theory was that Seybel as trustee held a mortgage for the benefit of his *cestui que trust*, and that he personally (or his firm which amounted to the same thing) owed Mrs. Alker some sixteen thousand dollars, which she had the right to call for at any time. He then proceeded to transfer, or cause to be transferred (if the transaction can be regarded as a transfer), the Noel bond and mortgage from himself as trustee to Mrs. Alker. No money passed. Nothing was given by Mrs. Alker, and

App. Div.]

First Department, July, 1917.

she apparently had no knowledge that the bond had been sold to her, for a considerable time afterwards. All that happened was that Seybel made some entries on his own books, reducing his indebtedness to Mrs. Alker by \$6,000, and charging himself with a like sum as trustee. This was a typical instance of the operation commonly known as "robbing Peter to pay Paul," but it is well settled that in such a case Peter, if he can trace and identify his property, and Paul has not transferred it to a *bona fide* purchaser for value, may recover it from Paul. (*Newton v. Porter*, 69 N. Y. 133.)

It is sought, however, to uphold the transaction on the ground that by the terms of the deed of trust Seybel was authorized to sell and transfer any securities in which the trust fund might be invested. Undoubtedly the trust deed did give him the power, and if he had sold the Noel bond and mortgage to a *bona fide* purchaser for value, the sale would be valid even if he afterwards embezzled the proceeds. But the power to sell did not involve the power to steal or to give away, and as I view the transaction there was no sale, and no consideration. Indeed there was not even a semblance of a sale from Seybel as trustee to Mrs. Alker. Acting in the name of the mortgage company, Seybel sold the same bond twice, once to himself as trustee, and then to Mrs. Alker. The latter paid nothing and the trust estate received nothing, for the making of entries on Seybel's books without the knowledge of either Mrs. Behrmann or Mrs. Alker cannot be treated as a payment to or by either of them.

The situation of the parties as I see it is as follows: Seybel, as trustee for Miss Clarkson, received a bond and mortgage which had belonged to her father's estate. The record title stood in the Park Mortgage Company, but the actual title became vested in Seybel, as trustee, by virtue of an instrument executed by the mortgage company, which while not in such form as to be recorded, yet was amply sufficient as between the trustee and the mortgage company to vest the whole title to the debt and the right to the possession of the securities in the trustee. This bond and the right to the possession of the securities was never assigned to any one by the trustee, and he never received any money in consideration of such assignment.

The mortgage company, having no longer any title to or interest in the debt, undertook to make a second sale of it to Mrs. Alker, who paid no consideration for it, except that Seybel, without her knowledge, made an entry in his books apparently reducing his indebtedness to her, at the same time making a corresponding entry in his account as trustee.

In this transaction I can see none of the elements of a *bona fide* sale by Seybel, as trustee, to Mrs. Alker. On the contrary, I think that the title to the bond and the right to have the securities never passed out of Seybel, as trustee, and that the substituted trustee succeeded to the title and right. It is sought to strengthen the claim of Mrs. Alker's estate by the plea that Miss Clarkson, by creating the trust and appointing Seybel trustee, enabled him to commit a fraud on herself and Mrs. Alker. But her case is no different from that of Mrs. Alker who gave her money to Seybel for investment, and thus, on her side, enabled him to do what he attempted to do. I have never before heard it seriously argued that a *cestui qui trust* is to be debarred from following property which her trustee has stolen or given away without consideration, merely because by appointing him trustee she put him in a position to defraud her.

I think that the judgment should be modified by granting the relief prayed for by plaintiff respecting the Noel bond and mortgage for \$6,000.

As to the \$200 participation in the Wright mortgage the plaintiff's claim does not seem to be so clear, and as to that the judgment should be affirmed.

Under these circumstances the plaintiff should have costs of appeal only against the Park Mortgage Company and the executors of Seybel.

CLARKE, P. J., concurred.

Judgment affirmed, with costs.

App. Div.]

First Department, July, 1917.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
SAMUEL MILCH, Appellant, Impleaded with DAVID
ALEXANDER and SAMUEL LUSTBADER, JR., Defendants.

First Department, July 13, 1917.

Crime — hostile attitude of trial judge toward defendant.

Judgment convicting the defendant of an attempt to commit grand larceny in the first degree reversed and a new trial granted because the hostile attitude of the judge toward the defendant during the trial was prejudicial to him so that he was not accorded the fair and impartial trial to which he was entitled.

APPEAL by the defendant, Samuel Milch, from a judgment of the Court of General Sessions of the Peace in and for the County of New York, Part IV, entered in the office of the clerk of said court on the 29th day of May, 1916, convicting him of an attempt to commit grand larceny in the first degree.

Joseph M. Proskauer, for the appellant.

Robert C. Taylor, for the respondent.

PER CURIAM:

The defendant Milch was convicted in the Court of General Sessions of an attempt to commit grand larceny in the first degree, in that he, in conjunction with the other defendants indicted with him, by false and fraudulent representations attempted to induce the payment by the Philadelphia Life Insurance Company of the amount of a policy of life insurance issued upon the life of one Samuel Caminsky. In view of the disposition we are about to make of the appeal, and the reasons for so disposing of it, we find it unnecessary to state the accusation and proof in detail.

The appellant in addition to pointing out alleged errors in the admission and rejection of evidence, and claiming that the evidence wholly fails to connect him with the crime, especially insists that throughout the trial the judge who presided at it evidenced such an hostile attitude towards said appellant, and otherwise so conducted the trial that the appellant was not accorded that fair and impartial trial

to which every one indicted for a criminal offense is entitled. This claim of unfairness in the trial is so earnestly insisted upon that we have examined the record with great care to see whether it is well founded, and we are compelled to say that it is, and that for that reason alone, without considering other alleged errors, the judgment of conviction cannot be allowed to stand. We do not believe that the judge who presided was intentionally unfair, but it is clear that he became much angered by certain incidents which occurred at the trial, and failed to retain that poise and self-restraint which the circumstances required. The result was that he showed very plainly his belief in the defendant's guilt in a manner which could not have failed to impress and influence the jury. No good purpose would be served by reciting in detail the particular acts which seem to us to have been unfair and prejudicial to the defendant. It is sufficient that for the reason given we reverse the judgment appealed from and grant a new trial.

Present — CLARKE, P. J., LAUGHLIN, SCOTT, DAVIS and SHEARN, JJ.

SCOTT, J.:

I agree that the defendant did not have an absolutely fair trial and that for that reason alone, if there were none other, the judgment appealed from should be reversed. I think, however, that the defendant was tried and convicted of a crime with which he was not charged in the indictment. The first count of the indictment (the second was dismissed) charges that on May 8, 1913, the defendant with others made certain false representations to the Philadelphia Life Insurance Company in a felonious and fraudulent attempt to deprive said company of its money.

The indictment recites by way of introduction the taking out of said policy in 1911, and names several persons who were instrumental in having the policy issued. The defendant, however, is not so named and is not charged, so far as the indictment goes, with the fraud which was undoubtedly committed at that time. When it comes to charging defendant with felonious and fraudulent acts it is not even alleged that he did those acts on the 8th day of May, 1913, "*and there-*

App. Div.]

First Department, July, 1917.

tofore." In short there is nothing in the indictment to advise him that it was intended to implicate him in the fraud of 1911, and yet the record is chiefly made up of evidence tending to establish that fraud and connecting defendant with it, and the court treated the case throughout as if defendant was being tried for complicity in the fraud of 1911. If that evidence, and the court's comments upon it, were out of the case it is impossible to say with certainty that the jury would have convicted the defendant of any crime, especially since, by May 8, 1913, the policy had become by its terms incontestable upon any ground.

The defendant, therefore, in my opinion, was convicted of a fraud in 1911 with which he was not charged in the indictment. I concur in the reversal of the judgment.

Judgment reversed and new trial ordered. Order to be settled on notice.

JAMES L. CLARE, as Executor, etc., of BRIDGET CLARE, Deceased, Respondent, v. NEW YORK LIFE INSURANCE COMPANY and Others, Defendants, Impleaded with WILHELMINA M. BONHAG and LOUISE M. BONHAG, Appellants.

First Department, July 18, 1917.

Mortgage — agreement by owner of mortgage that plaintiff shall have secondary interest therein — contract construed — agreement not creating trust relationship — extension of time of payment — when owner of secondary rights in mortgage not entitled to maintain foreclosure — receivership.

Where the defendant insurance company holding a bond and mortgage by assignment agreed with the plaintiff that he should have an interest in the mortgage to a certain amount, but that the defendant should be the owner of the balance and that its ownership was to be superior to that of the plaintiff, as if the latter's interest were a junior mortgage, and the defendant was entitled to satisfy the mortgage, being only required to account to the plaintiff for his interest, and the defendant had a full right to foreclose in case of default in which case the plaintiff was only to have a right to an accounting for moneys received in excess of the defendant's interest and the latter's rights were made irrevocable, there was no trust relationship between the parties, and hence the defendant at the maturity of the

mortgage had a right to extend the time of payment at the request of the owner of the equity of redemption.

Such extension of time did not give the plaintiff the right to bring a suit of foreclosure, that right being vested solely in the defendant.

It follows that, where the plaintiff brought an unauthorized suit of foreclosure, the defendant is entitled to have an order appointing a receiver vacated.

APPEAL by the defendants, Wilhelmina M. Bonhag and another, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 15th day of May, 1917, denying their motion to vacate a receivership in foreclosure.

Charles P. Hallock, for the appellants.

William F. Clare [*Frederick A. Gill* with him on the brief], for the respondent.

LAUGHLIN, J.:

The appellants are the owners of the equity of redemption. The action is brought to foreclose a mortgage for \$36,000 given by Flannigan, Inc., to the Title Insurance Company of New York, on the 23d day of February, 1912, as security for the payment of a bond of the same amount. The mortgage was assigned to the defendant insurance company on the day of its date and on the same day a participation agreement was made between the insurance company and the plaintiff, which recites that the mortgage was to be assigned to the insurance company and that plaintiff was to have an interest therein to the extent of \$6,000 and interest thereon, and that the insurance company was to become the owner of the balance, but that its ownership was to be superior to that of the plaintiff precisely as if the plaintiff's interest was in a junior mortgage. The participation agreement provided that the company might assign its interest and that it and its assignee were authorized to collect and accept payment of the entire amount and to execute a satisfaction of the mortgage, but that in either of said events was to account to the plaintiff for his interest. It was expressly provided that the insurance company should have all the rights of any holder of a bond and mortgage and a right to

App. Div.]

First Department, July, 1917.

foreclose in the event of a default and to receive the proceeds of a sale, but that plaintiff should have the right to an accounting for the moneys received in excess of the company's interest. It was further provided that the rights thus conferred upon the insurance company were irrevocable and that plaintiff should receive notice of any default and should be made a party defendant in any foreclosure action, and he agreed not to sell or assign his interest without the consent of the company. The mortgage fell due on the 23d day of February, 1917. Three days prior thereto, at the request of the owner of the equity of redemption, the insurance company extended the time of payment for three years on condition that \$500 be paid on the first day of March of each year and \$300 on the first day of August of each year. By the extension agreement the company reserved the right of recourse against any prior bondsmen. The plaintiff brings this action on the theory that the insurance company became his trustee and that on the failure of the company to foreclose on the maturity of the mortgage he had the right to do so, making the trustee a defendant, and he claims that the extension agreement was invalid.

The mortgage contained a clause assigning the rents to the mortgagee in case of default, and that is the theory on which the order appointing the receiver was made and has been sustained.

The appellants demurred to the complaint on the grounds (1) that plaintiff has no legal capacity to sue; (2) that title to the mortgage and the right of foreclosure is vested solely in the company; (3) that the company, having the legal and equitable title, was authorized to grant the extension, and (4) that the facts stated are insufficient to constitute a cause of action. The court at Special Term held that the extension agreement, if valid, released the liability on the bond, but that it was invalid. A demurrer to the complaint by the insurance company has been sustained at Special Term on the ground that it has the exclusive right of foreclosure and that plaintiff's sole remedy is under his contract with the company. (*Clare v. N. Y. Life Ins. Co.*, 100 Misc. Rep. 308.) The plaintiff in support of his contention that he has an interest in the mortgage sufficient to entitle him to bring the

action on the failure of the company so to do, relies on *Ettlinger v. Persian Rug & Carpet Co.* (142 N. Y. 189). In that case, however, there was an express trust. Appellants rely principally on *Lowenfeld v. Wimpie* (139 App. Div. 617), and it is, I think, controlling. In that case the plaintiff and defendant owned a bond and mortgage in severalty and agreed that plaintiff's ownership should be prior to and superior to that of the defendant, as if the plaintiff held a first mortgage, and that plaintiff should have all the rights of a holder of a bond and mortgage. The plaintiff, without the consent of the defendant, agreed that prior liens should be paid by a new first mortgage and that a new second mortgage should be substituted for the mortgage which the parties held in severalty. This court held that the taking of the new mortgage was authorized and that the participation agreement did not create a trust relationship between the parties; and the Court of Appeals affirmed on the opinion of this court written by Mr. Justice SCOTT (203 N. Y. 646). The participation agreement in that case was substantially the same as the one in question, and although the facts differ somewhat, that decision is not distinguishable in principle from the case at bar and is, therefore, controlling.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion to vacate the receivership granted, with ten dollars costs.

CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CASES REPORTED WITH BRIEF SYLLABI

AND

DECISIONS HANDED DOWN WITHOUT OPINION.

FIRST DEPARTMENT, APRIL, 1917.

GEORGE W. SIMERS, JR., Appellant, *v.* CLARA L. KELLOGG and Another,
Respondents, Impleaded with LIBERTY STORAGE & WAREHOUSE Co.

Appeal from a judgment of the Supreme Court dismissing the complaint after a trial at Trial Term, and also from an order denying a motion for a new trial.

PER CURIAM: It would serve no purpose to review the involved and complicated facts. It suffices to state that, drawing the inferences to which the plaintiff is entitled on a dismissal of the complaint, the evidence would have warranted the jury in finding that the washers replevined were those sold to the plaintiff on August 7, 1913. It clearly appears that the washers agreed to be delivered were those in transit, destined for the defendant Kellogg, that they were the only ones in transit destined for either of the defendants, that the defendant Kellogg was then entitled to their possession, that defendant Kellogg, pursuant to some private arrangement with her mother, defendant Hayes, with which we have no concern on this state of the record, undertook and agreed to turn them over to the plaintiff in fulfillment of the contract negotiated by her in the name of her mother and that these were the identical goods seized by the sheriff. The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ. Judgment and order reversed, new trial ordered, costs to appellant to abide event.

FREDERICK Y. ROBERTSON, Respondent, *v.* BEER, SONDHEIMER & Co., Inc.,
a Domestic Corporation, Appellant.

Appeal from an order denying a motion to vacate an order for the examination of defendant before trial.

PER CURIAM: The order appealed from should be reversed, without costs, and the motion to vacate the order for the examination granted to the extent of limiting the examination to the issue as to whether or not appellant assumed the liability of the copartnership under the contract with the plaintiff's assignor; time for the examination to proceed to be fixed on settlement of order. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ. Order reversed, without costs, and motion granted to the extent stated in opinion. Order to be settled on notice.

First Department, April, 1917.

[Vol. 178.]

C. C. DUNCAN COMPANY, INC., a Corporation, Appellant, v. HEMSLEY & COMPANY, LTD., a Corporation, Respondent.

Appeal by the plaintiff from so much of an order of the Supreme Court as requires it to serve a bill of particulars stating in detail the amount of damage it has suffered by reason of its claim that its business was destroyed.

PER CURIAM: The order appealed from is modified by striking out the following: "the special damage alleged to have been sustained by the plaintiff, stating in detail the amount of the damage plaintiff has suffered by reason of its claim that its business was destroyed, and;" and as so modified affirmed, with ten dollars costs and disbursements to the appellant, upon the ground that no special damages are alleged so far as concerns the said injuries complained of. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ. Order modified as stated in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MORRIS GLEESMAN, Appellant.

Crime — selling indecent literature.

Appeal from a judgment of the Court of Special Sessions of the City of New York convicting the defendant of a violation of section 1141 of the Penal Law.

Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.; Clarke, P. J., dissented.

CLARKE, P. J. (dissenting): The appellant was convicted of a violation of the provisions of section 1141 of the Penal Law which so far as applicable is as follows: "1. A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend or give away, or to show, * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; * * * is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than fifty dollars nor more than one thousand dollars or both fine and imprisonment for each offense." There is no dispute as to the fact that the appellant had in his possession with intent to sell the book in evidence upon which the information was founded. There is no doubt that the book contains filthy, indecent, disgusting and sacrilegious matter. If we were untrammelled by authoritative decisions of the court of last resort I would have no hesitation in voting to affirm this judgment. I feel bound, however, to subordinate my views to those of the Court of Appeals as expressed in *People v. Eastman* (188 N. Y. 478). In that case the dissenting opinion said: "If this paper is not of an indecent character and within the prohibition of the statute, then it is impossible, as I think, to conceive

App. Div.]

First Department, April, 1917.

of any printed matter that would be. It would seem to be a work of supererogation to argue, or to cite authorities, in support of the proposition that a writing so vile and nasty as this appears to be is of an indecent character; * * *." In reading this statute there may be some danger of falling into the error of construing "indecent" as synonymous with "lewd, lascivious," etc., used in connection with it, but an examination of the language of the section, from its appearance in the original Code of 1881 to the present time,* clearly discloses that the word does not necessarily have any reference to morals. The prohibition is against an "obscene or indecent" publication. The majority of the court, however, held to the contrary, saying: "The court is of opinion that the publication set forth in the indictment is improper, intemperate, unjustifiable and highly reprehensible, nevertheless, it is not 'indecent' as that word is employed in section 317 of the Penal Code. The definitions given by the standard lexicographers are not controlling in deciding its legal signification; many meanings as used in ordinary conversation are also irrelevant. * * * It is clear from the manner in which the Legislature has used the word 'indecent' that it relates to obscene prints or publications; it is not an attempt to regulate manners, but it is a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. The word 'indecent' is used in a limited sense in this connection and falls within the maxim of *noscitur a sociis*." In concurring Chief Judge Cullen said: "I concur in the opinion of the majority of the court, that the article complained of does not fall within the provisions of section 317 of the Penal Code, under which the defendant was indicted, which section makes it a misdemeanor to sell, give away or show any 'obscene, lewd, lascivious, filthy, indecent or disgusting book, paper or picture,' etc. * * * That it is 'indecent' from every consideration of propriety is entirely clear, but that is not the indecency condemned by this section of the Code. The preceding section punishes indecent exposure of person, the next section the sale of articles for indecent or immoral use. The chapter in which all the sections are found is entitled 'Indecent exposures, obscene exhibitions, books and prints, and bawdy and other disorderly houses.' From the context of the statute it is apparent that it is directed against lewd, lascivious and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire." *People v. Eastman* does not seem to have been questioned, weakened or modified by any subsequent decision of the Court of Appeals. It is, therefore, as I view it, a controlling interpretation of the section under which the information was founded and the appellant convicted. As it does not seem to me that the book in question is a "lewd, lascivious and salacious or obscene publication, the tendency of which is to excite lustful and lecherous desire" I am constrained to vote for a reversal.

* See Penal Code (Laws of 1881, chap. 676), § 317, as amd. by Laws of 1884, chap. 380; Laws of 1887, chap. 692, and Laws of 1900, chap. 731; now Penal Law, § 1141.—[R.E.P.]

LOTTIE ELIZABETH JOHNSON, Respondent, v. J. DUNCAN DITHRIDGE, Appellant.

Libel — complaint — sufficiency.

Appeal by the defendant from an order of the Supreme Court denying his motion for judgment on the pleadings consisting of a complaint and demurrer.

SCOTT, J.: The complaint attempts to set forth a cause of action for damages for a libel. The libel is not set forth at length, but it is alleged that defendant wrote a letter making certain statements concerning the plaintiff. These statements as recited in the complaint are not libelous *per se*, but plaintiff attempts to sustain the complaint by arguing that they were calculated to injure her in her occupation and calling which is that of a domestic servant. She does not, however, allege that the libel was published of and concerning her in her business or occupation, or that she has suffered special damage therefrom. The complaint is obviously insufficient and the defendant's motion should have been granted. The order appealed from is, therefore, reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, with leave to plaintiff to amend her complaint within twenty days after payment of all costs. CLARKE, P. J., LAUGHLIN, DAVIS and SHEARN, JJ., concurred. Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to plaintiff to amend on payment of costs.

LAMONT McLOUGHLIN, Appellant, v. THE CITY OF NEW YORK, Respondent.

Municipal corporation — New York city — salary of clerk.

Appeal from an order sustaining defendant's demurrer to the complaint, and from a judgment entered thereon, dismissing the complaint.

Judgment and order affirmed, with costs. No opinion. Present — CLARKE, P. J., SCOTT, DOWLING, SMITH and DAVIS, JJ.; SCOTT and DAVIS, JJ., dissented.

SCOTT, J. (dissenting): Plaintiff sues for salary from September 1, 1902, to March 23, 1904, as clerk to the change of grade damage commission. The facts alleged in the complaint present a somewhat unusual case as follows: The change of grade damage commission was created by chapter 537 of the Laws of 1893 for the purpose of passing upon the claims of certain property owners in the twenty-third and twenty-fourth wards of the city of New York who had suffered damage from the change of grades in those wards, and who under existing laws could gain no relief by action. The mayor of the city was authorized to appoint three commissioners to hear such claims, and the corporation counsel was directed to represent and protect the interests of the city. The commissioners were authorized and empowered to appoint a clerk, and it was required that a minute book be kept containing a faithful record of all these proceedings. The act was redrawn and re-enacted as chapter 567 of the Laws of 1894. In this act

App. Div.]

First Department, April, 1917.

the power of the commissioners to appoint a clerk was re-enacted. By section 6 of the latter act it was provided that the awards by the commissioners should become a charge against the city and should be met by the issue of bonds. It was further provided that "The expenses of said commission and the fees of said commissioners shall also be provided for by the issue of like bonds." The fees of the commissioners were fixed by the act. As to the other expenses, which obviously included the compensation of the clerk, it was provided that "A properly verified voucher shall be filed in the finance department, together with a certificate signed by said commissioners, or a majority of them, as to the amount of the other expenses of said commissioners, all of which, including said compensation to the commissioners, shall be payable as provided in section six of this act." (§ 7.) The act was subsequently amended several times, but none of these amendments affect the questions involved in this appeal. On May 5, 1893, the then mayor of the city of New York appointed three commissioners, who on May 10, 1893, appointed plaintiff clerk to said commission, fixing his salary at \$2,500 per annum. After the passage of the act of 1894 the mayor reappointed the commissioners and the latter reappointed plaintiff as clerk to the commission, again fixing his salary at \$2,500 per annum. As vacancies occurred in the commission by death or resignation the mayor of the city appointed other commissioners. On September 15, 1902, while the business of the commission still remained unfinished and incomplete, all of the three commissioners resigned and no new commissioners were appointed until March 23, 1904. During the interregnum there were no commissioners in office to sign or certify a voucher or certificate as to the amount due plaintiff for salary and consequently no certificate or voucher could be filed in the finance department. When the commission was appointed after the interregnum on March 23, 1904, the plaintiff presented to said commissioners a proper voucher for the payment of his salary from September 15, 1902, and requested that the same be signed and certified to the comptroller, but the commissioners unreasonably, as it is alleged, refused such request. Plaintiff was never suspended, discharged or removed from the position of clerk of said commission, no charges of any kind were ever preferred against him, and no person other than he performed any of the duties of such position. The commission, having finished the work for which it was created, adjourned *sine die* on May 31, 1914. The plaintiff has been paid all the salary from the date of his appointment down to September 1, 1902, and from March 23, 1904, down to the date when the commission ceased to exist. This action is for his salary during the interregnum when there were no commissioners in office. It is shown by the complaint that in 1899 the position of clerk of said commission was duly classified by the municipal civil service commission under the provisions of chapter 370 of the Laws of 1899, known as the White Civil Service Law, and was placed in one of the competitive classes. The principal objection which is urged in support of the demurrer is that under the terms of the act creating the change of grade damage commission it was made a condition precedent to the payment of any of the expenses of the commission

that there should be filed in the finance department a properly verified voucher together with a certificate signed by the commissioners or a majority of them, whereas the complaint expressly shows that this has not been done. In my opinion this objection is answered by the case of *Davidson v. Village of White Plains* (197 N. Y. 266). That action arose out of a contract for furnishing a pumping engine purchased by the water commissioners for the use of the village. By the terms of the act under which the commissioners acted it was provided that the money necessary to meet the expenses of the commission should be raised by the sale of bonds and that payments should be made upon accounts and bills presented and duly audited and certified by the commission. The plaintiff, Davidson, requested the water commissioners to audit and certify his bill, but they refused to do so, whereupon he sued the village, and was met by the same objection which is urged here, that his bill had not been audited and certified as required by the statute. This objection was overruled by the Court of Appeals. In the course of his opinion Chief Judge Cullen, who wrote for the court, said: "Though it was the duty of the plaintiff in the first instance, to apply to the board of water commissioners to audit and certify his claim, upon their refusal to comply with the demand he was not restricted to proceedings against the commissioners by mandamus. It may be questioned whether mandamus would lie in case the claim was in dispute. However this may be, such refusal would give a right of action against the village itself." This case has recently been cited and followed by the Federal Circuit Court of Appeals in this circuit. (*American Pipe & Construction Co. v. Westchester County*, 225 Fed. Rep. 947, 952.) It is true that in the cases above cited the claims were for work done and materials furnished under contracts, while the present case is for salary, but I am unable to perceive that this makes any difference. All are alike claims against the municipality incurred by a commission authorized to incur them. In the course of his opinion in the *Davidson* case Chief Judge Cullen points out the clear distinction between a case like that which he was then considering and cases like *Dannat v. Mayor* (66 N. Y. 585) and *Swift v. Mayor, etc.* (83 id. 528) which are much relied upon by the respondent. In each of these cases the department or instrumentality incurring the obligation was itself charged with the duty of making disbursements, the sole duty of the city being to furnish it with the fund out of which the payment was to be made. The same distinction applies to *Fidelity & Deposit Co. v. City of New York* (108 App. Div. 263). In the present case the act under which the change of grade damage commission acted expressly provides that the awards and expenses of the commission should be "a charge against" the city. The court at Special Term recognized the force of the *Davidson* case, but deemed it inapplicable because the commissioners were not agents of the city. I am not impressed with the force of this distinction. They certainly were city officers as much as and in the same way that the members of the Court of Claims are State officers. They were appointed by the mayor; paid out of the city treasury and authorized to incur expenses which became, by law, a charge against the city. For the

App. Div.]

First Department, April, 1917.

purpose of incurring such expenses they were certainly agents of the city. Nor is it, as I consider, an objection to plaintiff's right to recover that he does not allege that the municipal civil service commission had not certified on a payroll bearing his name that he had "been appointed or employed or promoted in pursuance of law and of the rules made in pursuance of law." The requirement for such a certificate is first found in chapter 370 of the Laws of 1899.* Plaintiff had been appointed long before that act was passed and no such certificate was required in his case. (*People ex rel. Wilson v. Knox*, 45 App. Div. 537, 542.) The question remains whether plaintiff continued to hold office during the interregnum of the commission. I think he did. His office was created and recognized by statute. He was not the appointee of any particular commissioner, nor were his duties confined to such as might be required of him by any particular commissioner. He was clerk to the commission as a body, and unless removed, he remained clerk to the commission no matter how often its membership changed. During the interregnum while there were no commissioners the office of the commission survived and the vacancies might have been filled at any moment. It may readily be assumed that even during the interregnum there may have been clerical duties to be performed by the clerk. The commission had offices and records and some one should have been in charge. Such duties would have been appropriate for the clerk. It frequently happens in public life that an office becomes vacant and remains so for a longer or shorter period, but it has never, so far as I am aware, been held that the permanent subordinates in such an office are *ipso facto* removed from office during the vacancy. Of course positions which bear a purely personal relation to the appointing power fall when that power ceases to hold office, but that is not this case. The order and judgment appealed from should be reversed, with costs and disbursements, and the demurrer overruled, with costs, with leave to defendant to withdraw the demurrer and answer over within twenty days on payment of all costs. Davis, J., concurred.

RUSSELL S. WOLFE, Appellant, v. FREDERICK G. MILLER, Respondent.

Attorney — professional services — bill of particulars.

Appeal from certain portions of an order of the Supreme Court, as resettled, directing the plaintiff to serve a bill of particulars.

DOWLING, J.: This action is brought to recover the sum of \$3,434.50 for professional services rendered by plaintiff, (an attorney) to defendant, in the prosecution of an action to obtain the reconveyance to defendant of certain real property theretofore conveyed by him to his wife; and for the services of counsel and the disbursements made therein. As the answer

* See Civil Service Law (Gen. Laws, chap. 3; Laws of 1899, chap. 370), § 19; now Civil Service Law (Consol. Laws, chap. 7; Laws of 1909, chap. 15), § 20, as amd. by Laws of 1909, chap. 240, and Laws of 1914, chap. 67.— [RMR.]

of the defendant does not deny the retainer by him of plaintiff in his professional capacity to commence and prosecute the action in question, there is no reason for directing plaintiff to furnish the particulars of his retainer and employment by defendant and the requirement that plaintiff furnish the particulars numbered I and II is, therefore, reversed. As to the items embraced in the subdivision marked III, plaintiff has already furnished the name of the counsel whose services were obtained for the trial of the action, but he should give the reasonable value of the services rendered by such counsel. As the services claimed to have been rendered by plaintiff were all in a single action, which is sufficiently set forth in the complaint, and for the single specific purpose of obtaining a reconveyance of a definite parcel of real estate, defendant is not entitled to the items called for by subdivisions IV and V. Plaintiff has already furnished an itemized bill of the disbursements made by him and does not appeal from the direction that he furnish same as required by subdivision VI. As plaintiff alleges in his complaint that no part of his bill has been paid by defendant, and there is no defense of payment in whole or in part, the plaintiff should not be required to furnish the items called for by the latter part of said subdivision. The order appealed from will, therefore, be modified by requiring plaintiff to furnish only a statement of the reasonable value of the services rendered by the trial counsel and as so modified, it is affirmed, with ten dollars costs and disbursements to appellant. Clarke, P. J., Scott, Smith and Davis, JJ., concurred. Order modified as stated in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

KATHERINE HORAN, as Administratrix, etc., Respondent, *v.* ALBERT H. HASTORF, Appellant.

Appeal from a judgment of the Supreme Court entered upon the verdict of a jury and also from an order denying a motion for a new trial.

Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.; Clarke P. J., and Dowling, J., dissented.

DOWLING, J. (dissenting): I dissent from the affirmance of the judgment upon the ground that the plaintiff did not rely upon the admission of the defendant's answer as to his duty of keeping the ramp in repair, but introduced the license in evidence, and that from said license, as matter of law, the defendant was not charged with the duty of keeping in condition the ramp or approach; upon the further ground that it was error, in the then condition of the proof, to refuse the motion to conform the pleadings to the proof at the close of the defendant's case; and upon the ground that it was prejudicial error to decline the request of the defendant's counsel to charge that the same degree and measure of care in the maintenance of the runway was required of the defendant as would be required of a municipality in its maintenance of highways. For these reasons I am in favor of a reversal and a new trial. Clarke, P. J., concurred.

App. Div.]

First Department, April, 1917.

MAX RADT, Respondent, v. **GREELEY SQUARE HOTEL COMPANY**, Appellant.— Judgment and order affirmed, with costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

EUGENE HIGGINS, Appellant, v. **THE CARTER'S INK COMPANY**, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

ISAAC LEVINSON, Respondent, v. **CRAWFORD'S TRANSFER** and Others, Impleaded with **MARKUS SCHNURMACHER** and Another, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

MARY F. MURPHY and Others, Appellants, v. **GEORGE K. MACKEY** and Others, Respondents, Impleaded with **EMILY OBERHELMAN**, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

HUDSON BUILDING, Appellant, v. **COMPAGNIE GENERALE TRANSATLANTIQUE**, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.; Clarke, P. J., dissented.

MARY T. PALMA, Appellant, v. **THE TOWN OF NORTH HEMPSTEAD**, Respondent. **WALTER W. HOFFMAN** v. **THE TOWN OF NORTH HEMPSTEAD**.— Judgments and orders affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

AMERICAN BILL POSTING COMPANY, Appellant, v. **JOHN H. SPRINGER** and Others, Respondents.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Davis, JJ.

MAURICE S. WEEKER, Respondent, v. **JOHN BALDWIN HAND**, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

THE BRADFORD COMPANY, Respondent, v. **JAMES H. DUNN**, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and answer on payment of costs. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

H. CLAY HOWARD, Respondent, v. **EDWARD N. BREITUNG** and Others, Copartners, etc., Appellants.— Order affirmed, with ten dollars costs and disbursements, with leave to defendants to withdraw demurrer and answer on payment of costs. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

MORRIS RINGULESCU, an Infant, by **HYMAN RINGULESCU**, His Guardian ad Litem, Appellant, v. **GEORGE W. LINCH**, as Receiver of the Second Avenue Railroad Company, Respondent. **HYMAN RINGULESCU**, Appellant, v. **GEORGE W. LINCH**, as Receiver of the Second Avenue Railroad Company, Respondent.— Judgments and orders affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

MORRIS RINGULESCU, an Infant, by **HYMAN RINGULESCU**, His Guardian ad Litem, Appellant, v. **JOHN BEAVER**, as Receiver of the Second Avenue Railroad Company, Respondent. (2 cases.)— Order affirmed, with ten

First Department, April, 1917.

[Vol. 178.]

dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

RUFUS M. OVERLANDER, Appellant, v. HOLBROOK, CABOT AND ROLLINS CORPORATION, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HENRY WONG, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

SOLOMON WEINHANDLER, v. PERRY LOEWENTHAL and Another.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

In the Matter of EMANUEL J. LIVINGSTON.— Referred to Hon. H. A. Gildersleeve, official referee. Order to be settled on notice. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

In the Matter of MICHAEL O. RINI.— Supplementary charges referred to Hon. H. A. Gildersleeve, official referee. Order to be settled on notice. Present — Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

A. W. McLAUGHLIN & COMPANY, Respondent, v. THE SOUTHERN HOTEL COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ETHEL S. SHAW, Appellant, v. RALPH DAVIS, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

MICHAEL J. MURRAY and Another, as Executors, etc., Appellants, v. FREDERICK WILLENBROCK, Respondent, Impleaded with Others.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, on the ground that no copy of the proposed answer was served with the moving papers, with leave to defendant to renew as stated in order. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

MYRTLE HURLOCK, Appellant, v. CASE HOTEL COMPANY, INC., and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

SIDNEY ASH, Respondent, v. UNITED TOILET GOODS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

MARIETTA WINDRAM, as Administratrix, etc., Respondent, v. BROOKLYN DAILY EAGLE, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ABRAHAM FRANKENBERG, Appellant, v. SIMON SPIEGEL and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

CLARENCE D. LEVEY, Respondent, v. EDMUND R. DODGE, Appellant.—

App. Div.]

First Department, April, 1917.

Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. ANDREW BRESLIN.— Motion granted. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. JAMES FLANAGAN.— Motion granted unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JOSHUA SILVERSTEIN v. STANDARD ACCIDENT INSURANCE COMPANY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

CHARLES ROSENBERG v. HARRY SCHWEITZER.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ANNA FOX v. LOUIS COHEN.— Motion denied. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

GEORGE W. DENNEDY v. I. SETH HIRSCH.— Motion granted with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

EUDORA S. VAN HORN v. FRANK M. VAN HORN.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

WATERBURY WALLACE COMPANY v. JAMES R. G. IVEY.— Applications granted. Orders signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

CHARLES H. CLARKE v. MOERLBACH SALES COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

EUGENE A. KOHUT v. ABRAHAM SCHOOR.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ISABELLA V. HALL v. CHRISTIAN DILG.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JOHN J. MCAULIFF v. UNITED FRUIT COMPANY. JOHN J. MCAULIFF v. BRADLEY W. PALMER.— Application granted. Orders signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

LOUIS A. ISRAEL v. DAVID UHR and Another.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ABRAHAM BIENENZUCHT v. ISABEL ANDERSON.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

SIXTH AVENUE REALTY COMPANY v. M. ZEILER & COMPANY. (2 cases.) — Applications denied, with ten dollars costs. Orders signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

SEYMOUR SANDROWITZ v. SAMUEL STRULOWITZ.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

First Department, April, 1917.

[Vol. 178.]

LEO STEIN and Others v. CHEMICAL IMPORTING AND MANUFACTURING COMPANY.—Motion denied, with ten dollars costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ELIZABETH CAREY v. MINERVA B. TOLER.—Motion denied, with ten dollars costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

HENRY F. WOLFF and Another v. A. LANTERNIER and Another.—Motion denied, with ten dollars costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JAMES FAY v. THE HERALD COMPANY.—Motion granted to extent stated in order and in other respects denied, without costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

INTERSTATE CHEMICAL COMPANY v. JAMES B. DUKE.—Motion for resettlement granted. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

ROCCO ROSCALZO v. PALISADE REALTY AND AMUSEMENT COMPANY.—Motion granted and stay vacated. Order to be settled on notice. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JACOB SCHEER v. SCHEER GINSBERG COMPANY.—Motion denied, with ten dollars costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

FRANCES STEIN v. GEORGE L. LYON.—Motion granted. Order to be settled on notice. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

WILLIAM R. MONTGOMERY v. WILSON M. SHEAR.—Motion granted, with ten dollars costs. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JOSEPH S. LESSER v. INTERNATIONAL TRUST COMPANY.—Motion denied, with ten dollars costs. Present—Clarke, P. J., Scott, Dowling, Smith and Davis, JJ.

JOSEPHINE GUNTZER v. TIMOTHY HEALY.—Motion denied, with ten dollars costs.

In the Matter of EDWARD HEREMAN.—Motion denied. Order to be settled on notice. Present—Clarke, P. J., Laughlin, Scott and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN PELLETIER, Appellant.—Judgment affirmed. No opinion. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

MARTHA THORMAN, Respondent, v. UNITED MERCHANTS REALTY AND IMPROVEMENT COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

DORMAN L. ORMSBY, Respondent, v. HILLTOP AUTOMOBILE STATION, INC., Appellant.—Determination affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Dowling and Davis, JJ.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title, etc., to the Lands, etc., Required for the Opening and Extending of Zerega Avenue, from Castle Hill Avenue at or near Hart's Street to Castle Hill Avenue at or near West Farms Road,

App. Div.]

First Department, April, 1917.

Being the Whole Length of Zerega Avenue (Including Avenue A and Green Lane), in the Twenty-fourth Ward, Borough of The Bronx, City of New York, as Amended, etc. Bronx Gas & Electric Company, Appellant; ROBERT J. TURNBULL and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

NANNIE LEWIS, Appellant, v. JOSEPH MORRIS, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

EMIL KAUFMANN, Respondent, v. HOLEMAN, COHEN & COMPANY, INC., Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

FRANK H. KENNY, Appellant, v. HARRY R. STEWART, Respondent, Impleaded with Another.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.; Clarke, P. J., and Davis, J., dissented.

MELVIN W. KERR, Respondent, v. ARTEMAS WARD, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

In the Matter of the Estate of HARRIET QUIMBY, Deceased. WILLIAM QUIMBY, as Executor, etc., of URSULA M. QUIMBY, Deceased, Appellant; JOHN A. SLEICHER, Executor, etc., of HARRIET QUIMBY, Deceased, Respondent.— Decree affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

HENRY WEBER, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment reversed, new trial ordered, costs to appellant to abide event, on the ground that the finding that the plaintiff was free from contributory negligence is against the weight of evidence. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.; Smith, J., dissented.

MINNIE STAMP, Respondent, v. EIGHTY-SIXTH STREET AMUSEMENT COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

HELEN HUMPHREYS JONES, Appellant, v. HUMPHREYS' HOMEOPATHIC MEDICINE COMPANY and Others, Respondents.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

SADIE TODD, Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

WILLIAM SLAVIZ, as Administrator, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Scott, Laughlin,

Smith, Page and Shearn, JJ.; Page, J., dissented on the ground that neither the employer nor the employee was engaged in interstate commerce at the time of the accident.

KATE MADDEN, Appellant, v. ANNA ELIZABETH SCHLOFFEL and Others, Respondents.—Judgment affirmed, with costs. No opinion. Present—Scott, Laughlin, Smith, Page and Shearn, JJ.

In the Matter of the Application of the MANHATTAN RAILWAY COMPANY, Appellant, v. MARIE REICHE, Respondent, Relative to Acquiring Title to Certain Real Property Located in the City and County of New York.—Judgment affirmed, with costs. No opinion. Present—Scott, Laughlin, Smith and Page, JJ.

WILLIAM A. MALLETT, Appellant, v. WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, and Another, Respondents.—Judgment affirmed, with costs. No opinion. Present—Scott, Laughlin, Smith, Page and Shearn, JJ.

JOHN F. KAISER and Another, Appellants, v. ELLEN MARY PARKER and Another, as Executors, etc., Respondents.—Judgment affirmed, with costs. No opinion. Present—Scott, Laughlin, Smith, Page and Shearn, JJ.

ABRAHAM BERZIN, Respondent, v. JACOB POLONSKY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present—Scott, Laughlin, Smith, Page and Shearn, JJ.

WILLIAM RANDOLPH HEARST, Respondent, v. THE ASSOCIATED PRESS, Appellant.—Judgment affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ONWARD CONSTRUCTION COMPANY, a Foreign Corporation, Appellant.—Judgment affirmed. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

WILLIAM BYERS, Appellant, v. FLUSHOVALVE COMPANY, Respondent.—Order affirmed, with ten dollars costs and disbursements, with leave to plaintiff to amend on payment of costs. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

JOSE SANTIAGO, Respondent, v. SOUTHERN PACIFIC COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Scott and Smith, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN D. ANTONOPULOS, Appellant.—Judgment affirmed. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES SMITH, Appellant.—Judgment affirmed. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GERTRUDE L. ZABRISKIE, Appellant.—Judgment affirmed. No opinion. Present—Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

FRANK R. LANG, Respondent, v. WILLIAM R. HARRISON, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Clarke, P. J., Scott, Smith, Page and Davis, JJ.

App. Div.]

First Department, April, 1917.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. C. ROCKLAND TYNG, Appellant, v. WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ELIZABETH C. BIGGS, Appellant, v. MARIA D. CLAPHAM, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of the Estate of FRANK E. WATERS, Deceased. WILLIAM H. WATERS, Appellant; GERTRUDE W. BLAKE and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

WILLIAM J. SMITH, as Special Administrator, etc., Appellant, v. STATEN ISLAND LAND COMPANY and Others, Respondents, Impleaded with Others. NATIONAL SURETY COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of the Application of J. B. GREENHUT & COMPANY, Private Bankers, Appellant, in Connection with the Voluntary Liquidation of Its Business, for the Return of Securities Deposited with the Superintendent of Banks of the State of New York, Respondent, and the Transfer to Said Superintendent of the Deposits Held by It.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.; Smith, J., dissented.

In the Matter of the Probate of a Paper Propounded as the Last Will and Testament of MARY SWEENEY, Deceased. DENNIS SWEENEY, Appellant; MARGARET SWEENEY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ANGIA P. CAPES, Respondent, v. WILLIAM P. CAPES, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

KITTANNING FACE BRICK COMPANY, INC., Respondent, v. LAWRENCE B. PEART, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

THE BRADFORD COMPANY, Respondent, v. JAMES H. DUNN, Defendant. FRANK CHARLES STRUDWICK, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of the Estate of FREDERICKA CATHERINE HAAG, Deceased. STEPHEN WENZEL and Others, Appellants; EDWARD A. ACKER, as Executor, etc., Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

MINNIE F. HIRSCH, Appellant, v. ALEXANDER H. ERICKSON, Respondent.— Order affirmed, with ten dollars costs and disbursements, with

First Department, April, 1917.

[Vol. 178.]

directions to plaintiff as stated in order. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

WILLIAM G. PHILLIPS, Respondent, v. SONN BROTHERS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of the Application of NANCY M. SANBORN, Respondent, to Punish EDWARD S. BARBER, Appellant, for Contempt of Court, etc. (2 cases.)— Orders affirmed, with ten dollars costs and disbursements. No opinion. Date of hearing before referee to be fixed on settlement of order. Orders to be settled on notice. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of Proving the Last Will and Testament of MARY V. McCUSKER, Deceased, as a Will of Real and Personal Property. In the Matter of the Application of EMILY E. ROONEY, Appellant, to Be Appointed One of the Executors of MARY V. McCUSKER, Deceased. JAMES J. ETCHINGHAM, as Surviving Executor, etc., Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

JOSEPH M. ESTERSON and Another, Appellants, v. OSTRANDER & COMPANY, INC., Respondent.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title, etc., to the Lands, Tenements and Hereditaments Required for the Widening of Whitlock Avenue, from Hoe Avenue to Faile Street, in the Twenty-third Ward, Borough of The Bronx, City of New York. WILLIAM SIMPSON, JR., and Another, as Executors, etc., Appellants. (2 cases.)— Orders affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

FRANCES RODDY v. NEW YORK RAILWAYS COMPANY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

MAE HAMILTON v. JOHN L. MURRAY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ALDEN W. MEEKS v. KATHERINE W. GRAVIER.— Motion granted, unless appellant complies with terms of order. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of MARY V. McCUSKER.— Motion denied, without costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

LEONARD SCHMIDT v. THE CITY OF NEW YORK. MARGARET SCHMIDT, v. THE CITY OF NEW YORK.— Motions granted, unless appellants comply with terms of order. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

AMALGAMATED MILLS v. GASTON, WILLIAMS AND WIGMORE.— Motion denied, without costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

App. Div.]

First Department, April, 1917.

THE PEOPLE OF THE STATE OF NEW YORK v. FRANK CARVILL.— Motion granted. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

JACQUES LEBAUDY v. CARNEGIE TRUST COMPANY.— Motion granted; order resettled. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

CAROLYN LAUNDRY v. LONDON AND LANCASHIRE COMPANY.— Application denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

GILMAN B. WARNE v. GRACE E. WHITE.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

NATHAN GINSBERG v. MORRIS B. SHERMAN.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

HYDE PARK FLINT BOTTLE COMPANY v. JULIA MILLER.— Application granted. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

PAOLO CASTIGLIONE v. AUSTRO-AMERICANA STEAMSHIP COMPANY.— Application granted. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SAMUEL SIESKIN v. THE WORKMEN'S CIRCLE.— Application granted. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

LOUIS STEIN v. SOEL SINGER.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

MAX SENNALL v. SAMUEL MILLER.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

H. CLAY HOWARD v. EDWARD N. BREITUNG.— Motion granted; question certified. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SAMUEL RONSHEIM v. KNICKERBOCKER ICE COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of EMMA MARCY RAYMOND.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

DENJN KAMENITSKY v. THOMAS F. CORCORAN.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

HYMAN WAKSCHAL v. DAVID WASSER.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

OTTO GERDAU COMPANY v. JOHN F. HERBERT.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ALEXANDER B. EBIN v. EQUITABLE LIFE ASSURANCE SOCIETY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of NOAH T. PIKE, Deceased.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of JOHN FOX, Deceased.— Motion for reargument of

Second Department, April, 1917.

[Vol. 178]

motion to dismiss appeal of Edward A. Noonan granted; and upon reargument, motion to dismiss appeal denied on condition that record is promptly filed and argument had when reached. Order to be settled on notice. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

PRUDENTIAL INSURANCE COMPANY v. NATIONAL BANK OF COMMERCE.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

RAYMOND HUBBELL v. CHARLES K. HARRIS.— Sufficient excuse not having been offered for the failure to conform to the order of this court, this motion is denied. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SAMUEL JOSEPH v. HARRY JOSEPH.— Motion for stay granted, conditioned on the prompt bringing on of the appeal from the order denying motion for leave to amend. Order to be settled on notice. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of SCHOOL SITE (JENNINGS STREET).— Motion granted; referred to Burt D. Whedon, Esq., referee. Order to be settled on notice. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

HENRY W. VAN WAGENEN v. JOHN C. FISHER.— Motion granted, unless appellant complies with terms of order. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

MORLAND MORTGAGE COMPANY v. JOHN C. FISHER.— Motion granted, unless appellant complies with terms of order. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

IDA WARONEN v. A. McMULLEN COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

CARL JUNK v. TERRY & TENCH COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of MARY SWEENEY, Deceased.— Motion for preference granted for May 15, 1917. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SECOND DEPARTMENT, APRIL, 1917.

GEORGE B. SPEARIN, Appellant, v. THE CITY OF NEW YORK, Respondent, and Others, Defendants.

Contract — breach.

Appeal by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Richmond on the 11th day of May, 1916, dismissing his complaint.

PER CURIAM: Plaintiff participated in the delay in executing the contract, and it does not appear that, so far as the defendant's acts or omissions caused it, there was a culpable exercise of the power reserved to it in the contract to lay out areas of work. The plaintiff's attitude, as it seems, was not that he was precluded from giving priority to all of the work south of the principal axis, but rather that at once, and continuously through the work, larger opportunities for fulfilling the contract were not afforded

App. Div.]

Second Department, April, 1917.

him. But in that regard the city, so far as appears, reasonably exercised the judgment which the contract gave it. The suspension of the work on September fifteenth to June twenty-fourth, by reason of the season, and the condition of other constructive work, was justified by the contract, provided the power was not abused. The burden was upon the plaintiff to show that the conditions at the time of the suspension did not justify it, or that such conditions had arisen from the defendant's fault, or that the duration of the suspension was so unreasonable as to amount to breach of its duty under the contract. So upon the facts, and without consideration of the question whether any damages were waived by the extensions of time, it is concluded that the judgment should be affirmed, with costs. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred. Judgment affirmed, with costs.

F. BELL-FENWICK, Appellant, v. CYPRESS HILLS CEMETERY and WILLIAM MILES, Respondents.— Order affirmed by default, with costs. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

ABRAHAM DOERFLER, Respondent, v. SARAH E. POTTEBERG, Individually and as Executrix, etc., and Others, Defendants, Impleaded with ISABELLA RUTH DOERFLER, Individually and as Administratrix, etc., and Others, Appellants.— In view of the former decision of the court in this litigation (See 170 App. Div. 578; 218 N. Y. 27; 177 App. Div. 927), it would seem that this order was improperly made. It is, therefore, reversed, with ten dollars costs and disbursements, and the motion denied. Jenks, P. J., Stapleton, Mills, Rich and Blackmar, JJ., concurred.

MAUDE A. DUVAL, Respondent, v. DEPOSITORS ASSETS CORPORATION, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted. The cause of action having arisen in the county of New York, and it appearing that all the witnesses reside either there or in the county of Kings, there is no reason why the contractor's assignee should have the case tried in Nassau county. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of **DATTON HEDGES, Appellant, to Lay Out a Highway in the Town of Brookhaven, etc. CLARENCE E. DARE, Superintendent of Highways, etc., Respondent.**— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

SAMUEL LEVITT, Appellant, v. IDA DINAH LEVITT, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SAMUEL BALSAMO, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed, by default. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES MARONNA, Appellant.— Judgment of conviction of the County Court of

Kings county, affirmed by default. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES A. P. RAMSDELL and Others, as Trustees, etc., Respondents, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants. (No. 1.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES A. P. RAMSDELL and Others, as Trustees, etc., Respondents, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants. (No. 2.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM O. MAILLER, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PENNSYLVANIA COAL COMPANY, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ERIE RAILROAD COMPANY, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. STEPHEN M. BULL, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, Orange County, New York, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE COLDWELL LAWN MOWER COMPANY, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CENTRAL HUDSON STEAMBOAT COMPANY, Respondent, v. JAMES MILLER, Assessor of the City of Newburgh, and Others, Appellants.— Order affirmed, with ten dollars

App. Div.]

Second Department, April, 1917.

costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

PAUL F. STEIN, Respondent, v. JOHN A. SNYDER, Appellant, and Another.— Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

TOWN OF BROOKHAVEN, Respondent, v. SAMUEL F. ROBINSON, Appellant.— Interlocutory judgment and order affirmed, with costs, with leave to the defendant to withdraw the demurrer and answer within twenty days, on payment of costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

ABRAHAM AXELROD, an Infant, etc., Respondent, v. SAMUEL LEVINE, Appellant.— Motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

LUDWIG BLITZ, Respondent, v. CHARLES T. WILSON and Others, Appellants.— Motion for stay granted, unless plaintiff stipulate to try the cause before a special jury in Kings county on the first Monday of May next. On such stipulation being made, the motion will be denied, without costs. Jenks, P. J., Stapleton, Putnam and Blackmar, JJ., concurred; Mills, J., not voting.

MAY M. GUGEL and Another, Respondents, v. EVERETT S. HISCOX and Another, Appellants, and Another, Defendant.— Motion for reargument granted, and case set down for Wednesday, April 18, 1917. (See, *post*, p. 907.) Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

In the Matter of the Final Judicial Settlement of the Accounts of GEORGE M. CLAPP, as Sole Surviving Trustee, etc., of BENJAMIN CLAPP, Deceased.— Order of reversal resettled in two respects: *First*, that it recite that an appeal was taken by Warren E. Clapp, Ruth A. Clapp and Dorothy J. Clapp, by Charles W. Boote, their guardian *ad litem*; also by Ina L. Clapp, Walter C. Clapp, Jr., and Sylvia J. Clapp, by Lawrence E. Sherwood, their guardian *ad litem*. *Second*, that at the foot of the order there be added "with liberty to the guardians *ad litem*, or either of them, to apply to the surrogate for an allowance, payable from the share of their respective wards, sufficient to cover such guardians' expenses on said appeal." Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ. Order to be settled before Mr. Justice Putnam.

In the Matter of the Application to Designate Certain Justices of the Supreme Court in the Second Department to Constitute the "Title Part" of the Special Term in said Court, Pursuant to the Provisions of Article XII of the Real Property Law, Otherwise Known as the Torrens Land Title Registration Law, as Amended by Chapter 547 of the Laws of 1916.*— Motion denied, without costs, without prejudice to a renewal when the amount of business under the Torrens Law makes it necessary or proper to designate a "Title Part." Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

* See Consol. Laws, chap. 50 (Laws of 1909, chap. 52), § 371, as amd. by Laws of 1916, chap. 547.— [REP.]

In the Matter of HERBERT A. KNOX, an Attorney.—Application and motion denied. Thomas, Mills, Rich and Putnam, JJ., concurred; Jenks, P. J., not voting.

MAX MEYER, Respondent, v. UNITED DRESSED BEEF COMPANY, Appellant.—Motion denied, upon condition that the appellant pay to the respondent ten dollars costs, perfect the appeal, place the case on the calendar for the May term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

WALTER B. MILKMAN, etc., Respondent, v. JOSE CASESA and Another, Appellants.—Motion granted, upon condition that appellants give a good and sufficient bond, to be approved by a justice of this court, against any waste of the property, and to pay for the use and occupation of it at the rate of thirty-five dollars per month, and also to pay the costs of the appeal. Present — Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ. Order to be settled before Mr. Justice Mills.

JOSEPH NEUSTADT, Respondent, v. JAMAICA ESTATES and Others, Appellants.—Motion denied, without costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL GERRY, Relator, v. ARTHUR WOODS, as Police Commissioner of the City of New York, Respondent.—Motion for reargument denied, without prejudice to a motion to resettle the order of this court so as to show that the court were not unanimous, as the dissent was from the reversal as to the first specification, as well as in regard to the second specification of the charges. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

WILLIAM H. SIEBER, Respondent, v. JOSHUA S. ALPHONSUS, Appellant.—Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ.

WILLIAM J. SMITH, as Administrator, etc., Respondent, v. DAVID CREAR and Others, Appellants.—Motion to resettle order granted so as to allow defendants to withdraw demurrer and to answer on payment of costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

SAMUEL STINER, Respondent, v. HENRY GIEBEL, Appellant.—Motion granted and appeal dismissed, without costs, but with ten dollars costs of the motion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

PHILLIPINA WULF, Respondent, v. CONEY ISLAND AND GRAVESEND RAILWAY COMPANY, Appellant.—Motion denied, upon condition that appellant perfect the appeal, place the case on the calendar for the May term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

FRANKLIN Q. BROWN and Others, Respondents, v. LESLIE B. WILSON and Another, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

ELIZABETH L. CODY, Respondent, v. NELLIE R. DAVIS and Others, Individually and as Executrices, etc., of CHARLES J. RANDALL, Deceased,

App. Div.]

Second Department, April, 1917.

Appellants.— Judgment affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

MICHAEL DELFINO, Respondent, v. MARINE METAL AND SUPPLY COMPANY, INC., Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, on the ground that it was error to deny the motion to dismiss the second cause of action; and on the further ground that the finding of damage in the first cause of action is contrary to the evidence. Jenks, P. J., Stapleton, Mills and Rich, JJ., concurred; Carr, J., not voting.

CHARLES ERICKSEN, Respondent, v. TIDEWATER PAPER MILLS COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MARGARET JACKSON, Appellant, v. MAGDALENA SCHWARTZ, Respondent.— We think the verdict of \$100 was not excessive. The learned trial court having been of opinion that plaintiff was entitled to recover, the order of the County Court of Kings county must be reversed, and the verdict unanimously reinstated, with costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MAYNARD A. KING, Respondent, v. CLARENCE SCOTT, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

LUCY MADDEN, an Infant, by JOHN MADDEN, Her Guardian ad Litem, Respondent, v. NICHOLAS AVITABILE, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

THE MANNING COMPANY, Respondent, v. SUSAN BILYOU, Appellant.— Judgment of the County Court of Orange county, affirming a judgment in the Justice's Court in favor of the plaintiff, affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

HELEN I. MAY, as Administratrix, etc., of EDWIN B. MAY, Deceased, Respondent, v. ORANGE AND ROCKLAND ELECTRIC COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

ALEXANDER MIKELIONIS (also known as ALEC MILIONIS), Appellant, v. THE LEHIGH AND WILKESBARRE COAL COMPANY, Respondent.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

ELLEN MONSELL, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.— Judgment and order of the City Court of Yonkers affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills and Rich, JJ., concurred; Carr, J., not voting.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ELIZABETH ALTENKIRCH, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MICHAEL LIVOTE, Appellant.— Judgment of conviction of the Court of Special Sessions

Second Department, April, 1917.

[Vol. 178.]

affirmed. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY P. TUTHILL, as County Treasurer of Suffolk County, Respondent, v. RILEY P. HOWELL, as Supervisor of the Town of Brookhaven, Suffolk County, Appellant.— Final order affirmed, with costs. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WESTCHESTER LIGHTING COMPANY, Respondent, v. CHARLES C. FUCHS, as Commissioner of Finance of the City of White Plains, Appellant.— The valuation of relator's special franchise for the year 1911, as equalized and corrected by the order of the Special Term, dated November 11, 1911, was the completed valuation of this franchise for that year. Therefore, that corrected valuation was the proper one to be taken by respondent for school district purposes for the levy of school taxes for the year 1912. Without regard to the amendment of the Special Term order, made May 21, 1914, the relator was entitled to mandamus for the refund of the excess. The order of May 25, 1915, is, therefore, affirmed, with ten dollars costs and disbursements. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

HENRY RAMME, Appellant, v. THE LONG ISLAND RAILROAD COMPANY, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

JOSEPH T. ROSS, Respondent, v. RODGERS & HAGEEY, INC., Appellant.— Judgment and order reversed, with costs, and complaint unanimously dismissed, with costs, upon the ground that there was no evidence of negligence on the part of defendant's foreman as a proximate cause of the accident. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

ELIZABETH SCHAEFFER, as Administratrix, etc., of STEPHEN J. SCHAEFFER, Deceased, Respondent, v. JOSEPH R. DE LAMAR, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Blackmar, JJ., concurred.

LAURENCE TIMMONS, Respondent, v. FANNIE S. RUSSELL, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

F. BELL-FENWICK, Appellant, v. CYPRESS HILLS CEMETERY and Another, Respondents.— Motion granted on condition that appellant pay twenty dollars costs, place the case on the May calendar and be ready for argument when reached; otherwise, motion denied, with ten dollars costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

JOSEPH P. CARNEY, Appellant, v. PENN REALTY COMPANY, Respondent.— Motion denied, without costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

JOHN DUNSMURE, Respondent, v. HOTEL SHELBURNE, INC., Appellant.— Motion granted on condition that appellant perfect the appeal, place the case on the May calendar and be ready for argument on the second Monday of that term. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

App. Div.]

Second Department, April, 1917.

JOHN FAINOR, Respondent, v. ANNIE FAINOR, Appellant.— Motion granted, appeal dismissed, and order signed. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

In the Matter of the Application of **JACOB BROOKS**, for an Order Directing **WILLIAM HARRY MONTGOMERY**, an Attorney, to Turn over Certain Moneys. — Motion denied. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

In the Matter of the Application of the **CITY OF NEW YORK**, Relative to Acquiring Title, etc., for the Opening and Extending of Juniper Avenue, etc.— Motion to resettle order denied. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

In the Matter of the Application of the **CITY OF NEW YORK**, Relative to Acquiring Title, etc., for the Opening and Extending of Juniper Avenue, etc.— Motion for leave to appeal to the Court of Appeals denied, without costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

ANNA BUCHANAN KINNEAR, Respondent, v. FRANK PETER KINNEAR, Appellant.— Motion denied, with ten dollars costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

MAX PHILLIPS, Respondent, v. WEST ROCKAWAY LAND COMPANY and BELLE HARBOR-EDGEMERE REALTY COMPANY, INC., Appellants.— Motion denied, with ten dollars costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

HELEN L. POLLITZER, Respondent, v. WILLIAM S. POLLITZER, Appellant.— Motion granted, plaintiff required to accept both notices of appeal, reserving, however, until the hearing of the appeals the effect of the notice of appeal from the judgment of November fourth. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

EDWARD J. AHRENS, Respondent, v. LEFSTEIN & ROSENFELD, Defendant, and MORRIS LEFSTEIN, Appellant.— Order affirmed, with ten dollars costs and disbursements. The facts as stated in the complaint and as admitted by the demurrer, do not show receipt of the money for the purpose of conversion, or refusal to surrender the same to the plaintiff's employer, or any demand therefor, and the history of the transaction intermediate the receipt of the money to the application for the warrant is absent. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

BENJAMIN R. BERTRAND, Appellant, v. OESTING BUILDING COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Stapleton, Mills, Putnam and Blackmar, JJ., concurred; Jenks, P. J., not voting.

In the Matter of the Petition of **ANDREW HERBERT**, to Prove the Last Will and Testament of **FRANK ALOIS HECK**, Late of the County of Queens, Deceased. **ANNA MARIE HECK, Appellant; ANDREW HERBERT, Executor, etc., Respondent.**— Decree of the Surrogate's Court of Queens county affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

EVA KRAUSE, Respondent, v. CARRIE G. PHILLIPS, Appellant.— Order of March fourteenth reversed, with ten dollars costs and disbursements; and

plaintiff's motion to limit scope of original order for examination before trial denied, with ten dollars costs. Matter remitted to the Special Term to fix the time and place for such examination under the order as now revised. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THOMAS NELSON MCKEE, Respondent, v. **STANDARD OIL COMPANY OF NEW YORK**, Appellant.—Order affirmed, without costs, and without prejudice to a renewal of the motion if the plaintiff does not proceed with the utmost diligence. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. **SIBIO NAPPO**, Appellant.—This conviction of burglary in the third degree was against the weight of evidence. There was no sufficient proof of the defendant's commission of the crime. The testimony of the witness Burns to hearing the defendant's voice in the apartment was attempted to be corroborated by her statement that she saw him in the hallway through broken panes of a window in the rear room. This description of the window was negated by proof that, three weeks later, none of the panes was then broken or cracked, or bore evidence of having been replaced. We think, also, the matter of defendant's employment and his alleged statement, "I don't have to work," was a collateral one, on which it was error to call Officer Mealli in contradiction, in which his alleged remarks to defendant were decidedly prejudicial to his character for industry or steady employment. (*People v. Gibson*, 24 App. Div. 12; *People v. De Garmo*, 179 N. Y. 130, 134; Whart. Crim. Ev. [10th ed.] § 429a.) The judgment of conviction of the County Court of Kings county is reversed, and a new trial ordered. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THOMAS E. QUINN, Respondent, v. **JOHN THATCHER & SON**, Appellant.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

JOHN E. SECOR, Respondent, v. **NEW JERSEY AND NEW YORK RAILROAD COMPANY**, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

ELMER SOUTHARD, by **CHARLES W. SOUTHARD**, His Guardian ad Litem, Respondent, v. **HARRY M. JACKSON**, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

CHARLES W. SOUTHARD, Respondent, v. **HARRY M. JACKSON**, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

JOSEPH ZIMIT, Respondent, v. **SARAH CHAITMAN and Others**, Appellants.—Order of the County Court of Kings county reversed, demurrer overruled, and motion denied, without costs here or below, upon the ground that matters should not be imported into the complaint upon the theory of judicial notice of the condition of the record in the register's office, nor should a motion to strike out allegations in the answer be based upon such

App. Div.]

Second Department, April, 1917.

assumed judicial cognizance. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. PATRIUS C. VON DEN CORPUT, alias JOHN HENDRICKS, Appellant.—We find that we have not the power. Any attempt by indirection to stay the execution would be fruitless and an improper attempt to interfere with the executive power. (See fuller report of same case, 177 App. Div. 682.)

PAULINE ARNOLD, Appellant, v. DAVID OLIVER, Doing Business under the Firm Name and Style of D. OLIVER & Co., Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich and Putnam, JJ., concurred; Thomas, J., dissented.

GEORGE E. BROWNELL, Appellant, v. DAISY M. BROWNELL, Respondent.—Judgment and order affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

JAMES CARTER, Respondent, v. THE CITY OF NEW YORK, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

MAY M. GUGEL and DAISY E. ATCHINSON, Respondents, v. EVERETT S. HISCOX and JESSE F. HISCOX, Appellants, and Another, Defendant.—Order affirmed on reargument, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

In the Matter of the Application of JACOB BROOKS, Appellant, for an Order Directing WILLIAM HARRY MONTGOMERY, an Attorney, Respondent, to Turn over Certain Moneys.—The learned justice at the Special Term in his discretion denied this extreme remedy. Such relief is granted only in very clear cases, as a client's right may always be determined in an action. (*Matter of Schell*, 128 N. Y. 67.) No sufficient ground appears for this court to say that the Special Term should have ordered summarily such payment, and thus ignored and disregarded the attorney's lien as claimed. The order is, therefore, affirmed, without costs, but such disposition is without prejudice to any action now pending, or which may be brought between these parties. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

SADIE E. KERN, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.—Judgment unanimously affirmed on reargument, with costs. (See 177 App. Div. 929.) No opinion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

GEORGE MICHEL, Respondent, v. WALTON TOY COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

ROSE M. PALMER and LILLIAN PALMER, Appellants, v. ROTARY REALTY COMPANY and Others, Respondents.—This demurrer to the amended complaint was well taken. An alleged promise to hold land and then to reconvey on request, resting wholly in parol, is within the Statute of Frauds. (Real Prop. Law, § 242; * 20 Cyc. 233 (e).) Even if in writing, such a

* See Consol. Laws, chap. 50 (Laws of 1909, chap. 52), § 242.—[REp.]

promise to reconvey would not be specifically enforced for the reason that it was unilateral, as plaintiffs do not show that they agreed to take back the property. (*Levin v. Dietz*, 194 N. Y. 376; *Riker v. Comfort*, 140 App. Div. 117.) These appellants cannot avail themselves of the alleged usury in giving a mortgage before they acquired the property. The order is, therefore, affirmed, with ten dollars costs and disbursements. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

MARY PEARSALL, as Administratrix, etc., of HARRY LATHAM PEARSALL, Deceased, Appellant, v. ERIE RAILROAD COMPANY, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ELBERT L. CONKLIN, Appellant, v. EDWARD F. BOYLE and Others, Constituting the Board of Elections of the City of New York, Respondents.—Order affirmed, upon the grounds (1) that the writ would be inoperative; (2) that the Court of Appeals decided that the special election should be held, and that it was the duty of the Governor to order it. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.*

ALFRED J. RAPSON, Respondent, v. THE CITY OF NEW YORK, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

WILLIAM A. SCHWALBACH, Respondent, v. THE CITY OF NEW YORK, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

FOURTH DEPARTMENT, APRIL, 1917.

JOSEPH M. EGLOFF, Appellant, v. EDWARD C. TANGER, Respondent.—Judgment affirmed, with costs. All concurred.

SYRACUSE LIGHTING COMPANY, Respondent, v. MARYLAND CASUALTY COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred, except Merrell, J., who dissented.

JOHN W. COOK, Respondent, v. EDWARD G. SHATTLE, Appellant.—Order reversed, with costs, and verdict of jury reinstated, with costs. All concurred.

AMERICAN NATIONAL BANK OF BENTON HARBOR, MICHIGAN, Respondent, v. GEORGE R. BROWN, Sheriff of Monroe County, and Others, Appellants.—Judgment affirmed, with costs. All concurred.

WILLIAM A. QUAST, Respondent, v. FIDELITY MUTUAL LIFE INSURANCE COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK LA POINT, Appellant.—Judgment of conviction and orders affirmed. All concurred.

* See *Matter of Mitchell v. Boyle* (219 N. Y. 242); *People ex rel. Conklin v. Boyle* (98 Misc. Rep. 364).—[REP.]

App. Div.]

Fourth Department, April, 1917.

In the Matter of the Final Judicial Settlement of the Accounts of SECURITY TRUST COMPANY OF ROCHESTER, as Executor, etc., of JAMES T. MILLER, Deceased, Appellant. CARRIE E. MILLER, Appellant; FRANCIS C. MILLER and Others, Respondents.—Decree affirmed, with costs to respondents upon each appeal. All concurred.

IDA McCALE and Another, as Executors, etc., Appellants, v. NEW YORK STATE RAILWAYS, Respondent.—Judgment affirmed, with costs. All concurred, except Kruse, P. J., who dissented upon the ground that the evidence tends to show that the deceased was aware of the approach of the street car, but had reasonable grounds to believe that it would stop or slacken its speed so that he could cross the tracks in safety, and after he had started to cross and it was apparent that he intended to cross, and when the street car was within 100 feet of the crossing, the speed of the car was suddenly accelerated, resulting in the collision.

WILLIAM J. WITTMAN, Respondent, Appellant, v. THE DUROLITHIC COMPANY, Appellant, and JAMES G. DAVIS, Respondent.—Judgment and order in favor of plaintiff against Duro lithic Company affirmed, with costs. Judgment and order in favor of defendant Davis against plaintiff affirmed, with costs. All concurred.

CATHERINE A. DALY, Plaintiff, v. THE DAKE REALTY CORPORATION, Defendant.—Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs. All concurred.

HANORA M. CRONIN, Appellant, v. KATHERINE O'LEARY, Substituted as Defendant in the Place and Stead of SUPREME COUNCIL OF THE CATHOLIC MUTUAL BENEFIT ASSOCIATION, Respondent.—Judgment affirmed, with costs. All concurred.

IMO W. TOMS LANGDON, Respondent, v. TOWN OF NEWFANE, NIAGARA COUNTY, NEW YORK, Appellant.—Judgment affirmed, with costs. All concurred.

JOHN C. DUVAL, an Infant, etc., Respondent, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred.

ROCHESTER RAILWAY AND LIGHT COMPANY, Appellant, v. JOHN H. SPEARY, Respondent.—Judgment affirmed, with costs. All concurred.

In the Matter of the Petition of CHILES HIDECKER and Others, Appellants, for the Drainage of Low, Wet, Marsh and Swampy Lands in the Counties of Chautauqua and Cattaraugus. JULIUS N. SHAW and Others, Respondents.—Order affirmed, with costs. All concurred; Lambert, J., not sitting.

DANIEL JUDGE, Respondent, v. THE CITY OF WATERTOWN, Appellant.—Judgment and orders affirmed, with costs. All concurred.

RAPLEY P. MERRIMAN, Respondent, v. WILLIAM M. STEELE, Appellant.—Judgment affirmed, with costs. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. RAYMOND CAREY, Appellant.—Judgment of conviction and order affirmed, under the provisions of section 542 of the Code of Criminal Procedure. All concurred.

Cecil L. Shipman, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

IROQUOIS RUBBER COMPANY, Respondent, v. ARTHUR E. J. MALE and Others, Defendants, Impleaded with ERIK HETL, Appellant.— Judgment and order of the Special Term of the City Court of Buffalo reversed, and a new trial granted in the City Court, with costs in all courts to the appellant to abide the event. New trial to be had on the 18th day of April, 1917, at ten A. M. Held, that the condition limiting the right of the plaintiff to give testimony was error. All concurred.

CHARLES A. VIDINGHOFF, Appellant, v. T. H. STYNGTON COMPANY, Respondent.— Judgment and order affirmed, with costs. New trial in Rochester Municipal Court to be had on the 18th day of April, 1917, at ten A. M. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. SARANAC LAND AND TIMBER COMPANY, Relator, v. THE EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT and Others, Defendants.— Order entered March 30, 1917, amended so as to state that the application was denied as matter of law and not in the exercise of discretion.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THEODORE POMESKA, Appellant.— Appeal dismissed upon stipulation filed.

In the Matter of Proving the Last Will and Testament of ALICE FREELAND, Deceased.— Appeal dismissed, without costs, upon stipulation filed.

MARY M. REMINGTON, Individually, etc., Appellant, v. JOHN B. TAYLOR and Others, Respondents.— Motion granted and appeal dismissed, with costs.

SOPHIA REMINGTON, Individually, etc., Appellant, v. JOHN B. TAYLOR and Others, Respondents.— Motion granted and appeal dismissed, with costs.

GEORGE REIMANN, Respondent, v. MARY KROHN, as Administratrix, etc., Appellant.— Motion granted and appeal dismissed, with costs.

ERWIN H. LANPHEAR, Respondent, v. EDNA M. PARTRIDGE, Appellant, Impleaded, etc.— Motion granted, substituting Lillian Lanphear, as executrix of the last will and testament of Erwin H. Lanphear, deceased, in place of said Erwin H. Lanphear.

SAMUEL S. RAMSDALL, an Infant, etc., Respondent, v. COOMBS AEROPLANE COMPANY, INC., Appellant.— Order opening defendant's default vacated for failure of appellant to comply with the conditions imposed by the order.

FRANK & MILLER, INC., Appellant, v. CELIA ELMORE, Respondent.— Motion to dismiss appeal denied.

CATHRINE A. GREENWOOD, as Administratrix, etc., Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.— Motion granted to vacate order denying appellant's application to open default, upon condition that appellant pay to respondent's attorneys ten dollars and argue the appeal at the May term.

The following candidates were admitted to practice as attorneys and counselors at law during the March term, 1917:

Upon examination by State Board of Law Examiners: Edith J. Drumm,

App. Div.]

First Department, May, 1917.

of Buffalo; Charles M. Merritt, of Syracuse; Tobias E. Purcell, of New York city; A. Edward Krieger, of Salamanca; Edward G. Kinkel, of Buffalo; Thomas J. Campbell, of Buffalo; George E. Phillies, of Buffalo; Michael A. Hogan, of Rochester; Frank A. Stedman, of Livonia; Dwight Copley Pitcher, of Brooklyn; Ralph C. Taylor, of Lockport; Carroll M. Roberts, of Rochester; Clarence Lynn Chamberlain, of Port Dickinson; Raymond A. Smith, of East Hampton; J. Russell Rogerson, of Jamestown; Joseph A. Gloger, of Syracuse; John D. Dickson, of Angelica; G. Reynolds Stearns, Jr., of Buffalo.

Upon Pennsylvania credentials: William S. Smith, of Niagara Falls.

MARGARET JOYCE, Respondent, v. EASTMAN KODAK COMPANY, Appellant. — Order affirmed, with ten dollars costs and disbursements. All concurred.

AMERICAN BLUE STONE COMPANY, Respondent, v. COHN CUT STONE COMPANY, Appellant. JOHN M. COHN, Relator. — Motion for leave to appeal to the Court of Appeals granted.

In the Matter of the Discontinuance of a Portion of JOINER STREET in the City of Rochester. — Motion for leave to appeal to the Court of Appeals from order denying respondents' motion to add certain exhibits to the record granted and questions for review certified.

FIRST DEPARTMENT, MAY, 1917.

In the Matter of HENRY KUNTZ, an Attorney.

Disbarment — conviction for a felony.

Disciplinary proceeding against an attorney instituted by the Association of the Bar of the City of New York.

PER CURIAM: Respondent was admitted to the Bar of the State of New York in May, 1898. On the 2d day of February, 1917, he was convicted in the District Court of the United States for the Southern District of New York of the crime of conspiring to conceal assets from a trustee in a bankruptcy proceeding, which crime was a felony, and was sentenced to imprisonment for a term of two years at the United States penitentiary, Atlanta, Ga., and to pay a fine of \$5,000. A certified copy of the judgment of conviction having been presented to this court and the petition herein having been duly served upon the respondent, and he not having appeared or answered he is disbarred under the provisions of section 477 of the Judiciary Law.* Present — Clarke, P. J., Laughlin, Scott, Smith and Shearn, JJ. Respondent disbarred. Order to be settled on notice.

* Consol. Laws, chap. 30 (Laws of 1909, chap. 35), § 477. See Id. § 88, subd. 3.— [REP.]

LOUIS GISNET, Appellant, v. JOHN MOECKEL and Others, Respondents.
Fraud — sale of goods in bulk — retention of possession — rights of creditors.

Appeal from a judgment of the Supreme Court in favor of the defendants entered upon the decision of the court after a trial without a jury.

SCOTT, J.: By this action the plaintiff, as assignee of a judgment creditor of John Moeckel and Harry Kersting, formerly copartners in business, seeks to set aside a transfer by said copartners of the goods, lease and business conducted by said copartners to the defendant Marcus Bower. By the complaint it would appear that the transfer was claimed to be void under the Bulk Sale Act (Pers. Prop. Law, § 44),* and so it clearly was. It was also void, according to the evidence, under section 36 of the Personal Property Law† in that it was not accompanied by an immediate delivery followed by actual and continued change of possession. The evidence does not clearly show that plaintiff's assignor was a creditor at the time the transfer was made. This objection, whether it be of consequence or not, was not made at the trial. If it had been perhaps it could have been met by proof. At all events it cannot be taken advantage of for the first time on appeal. The judgment should be reversed and a new trial granted, with costs to appellant to abide the event. The findings that the sale was not fraudulently made and that said sale was within the provisions of the statute are hereby reversed. Clarke, P. J., Laughlin, Davis and Shearn, JJ., concurred. Judgment reversed, new trial ordered, costs to appellant to abide event.

SAMUEL JOSEPH, Respondent, v. HARRY JOSEPH and DAVID JOSEPH, Appellants.

Appeal from an order denying the defendants' motion for leave to amend answers.

PER CURIAM: The order appealed from is reversed, with ten dollars costs and disbursements, and the motion for leave to serve the proposed amended answers granted, upon payment of all costs of the action to the date of the motion, to be taxed, less the costs allowed appellants on the appeal, and upon the further condition that the cause shall retain its present date of issue and place on the calendar, provided plaintiff elects to reply to the counterclaim and proceed with the trial; but not if he shall demur thereto. Present — Clarke, P. J., Laughlin, Scott, Davis, and Shearn, JJ. Order reversed, with ten dollars costs and disbursements, and motion granted on the conditions stated in opinion. Order to be settled on notice.

* See Consol. Laws, chap. 41 (Laws of 1909, chap. 45), § 44, as amd. by Laws of 1914, chap. 507.—[REF.]

† Repealed by Laws of 1911, chap. 571.—[REF.]

ROSE GUZZARDI, Appellant, v. AMERICAN DISTILLED WATER COMPANY, Respondent.

Appeal from a judgment of the Supreme Court dismissing the complaint upon the defendant's motion after a trial at Trial Term, and also from an order denying the plaintiff's motion for a new trial.

PER CURIAM: We are of opinion that the evidence presented questions of fact for the jury to determine. The judgment and order appealed from are, therefore, reversed and a new trial ordered, with costs to appellant to abide the event. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ. Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

THOMAS E. NOLAN, Respondent, v. PETER J. MALLEY, Appellant.— Judgment and order reversed, new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce verdict to \$10,000; in which event, judgment, as so modified, and order affirmed, without costs. No opinion. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.; Shearn, J., dissented and voted for reversal and new trial.

MARION HAYWARD, Respondent, v. IRVING HAYWARD, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Davis and Shearn, JJ.

JOSEPH BURKHARDT, as Administrator, etc., Respondent, v. ACKER, MERRALL & CONDIT Co. and FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY, Appellants.— Judgment affirmed, with costs to Acker, Merrall & Condit Co. and reversed and complaint dismissed as to railroad company. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Shearn, JJ.; Laughlin and Page, JJ., dissented as to railroad company. Order to be settled on notice.

FRANK J. BAUMERT and Others, Respondents, v. MANFRED MALKIN and Another, Appellants.— Order reversed, with ten dollars costs and disbursements and motion denied, with ten dollars costs, with leave to plaintiffs to amend on payment of costs, on *Reed v. Sobel* (177 App. Div. 532), decided April 13, 1917. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

FLORENCE VALENSI BENOLIEL, Respondent, v. ABRAHAM BENOLIEL and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. (See *Roessle v. Roessle*, 163 App. Div. 344.) Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SOLOMON OKUN, Respondent, v. THE DUVAL COMPANY, Appellant.— Judgment and order reversed, new trial ordered, costs to appellant to abide event, on the ground that the verdict is against the weight of evidence. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

WILLIAM H. GRANBERRY, Appellant, v. GEORGE C. TAYLOR, as President

of the AMERICAN EXPRESS COMPANY, an Unincorporated Association, etc., Respondent.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

JAMES B. BLAINE, Respondent, v. SIDONIE C. THURN and Another, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

CELIA MUSICANT, an Infant, by ABRAHAM MUSICANT, Her Guardian ad Litem, Appellant, v. BRADLEY CONTRACTING COMPANY, Respondent. ABRAHAM MUSICANT, Appellant, v. BRADLEY CONTRACTING COMPANY, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH TORTORA, Appellant.— Judgment affirmed. No opinion. Present— Clarke, P. J., Scott, Smith, Page and Davis, JJ.

THOMPSON-STARRETT COMPANY, Appellant, v. FEDERAL-HUBER COMPANY, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ROBERT HOLMES, Individually and as Trustees, etc., and Others, Appellants, v. SAINT JOSEPH LEAD COMPANY, a Corporation, and Others, Impleaded with EDWARD C. SMITH and Another, Respondents.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

JOSEPH S. MULRONEY, Respondent, v. METAL SHELTER COMPANY, INC., Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ISADORE SCHWARTZ, Respondent, v. HYMAN LEVIN, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SOLOMON HIRSCH, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

ANTHONY MOTT v. THOMAS W. MARTIN.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

In the Matter of ABRAHAM GOLDFARB.— See memorandum. Present — Clarke, P. J., Scott, Smith, Page and Davis, JJ.

SPIRITUSFABRIEK ASTRA OF AMSTERDAM, HOLLAND, Appellant, v. SUGAR PRODUCTS COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements, unless the stipulation be given that an order may be entered for the issuance of an open commission in Amsterdam, Holland, or London, England, to take the testimony of the witnesses named, the plaintiff paying the expenses of the defendant, not to exceed a certain sum to be named in the order, the amount of these expenses to be taxed by the prevailing party. In case such stipulation is made and filed within ten days from service of order to be entered hereon, with notice of entry, the order appealed from will be reversed, without costs. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

CORNELIUS HUNT, Respondent, v. BURTON F. KREYER, Appellant.—

App. Div.]

First Department, May, 1917.

Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

CHRISTOFFER HANNEVIG, Appellant, v. IRVING COX and Another, Copartners, etc., and WILLARD U. TAYLOR, Respondent.— Order for bill of particulars modified by striking from paragraph 2a the requirement to "state all the circumstances in connection therewith," and by striking out the requirements of paragraphs 7a and 7b, and as so modified affirmed, without costs. No opinion. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

JOHN H. TILTON, JR., Respondent, v. WILLIAM GRANT BROWN and Another, Appellants, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements; the date upon which examination is to proceed to be fixed in order. No opinion. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

AGNES H. MAIER, Respondent, v. JOSEPH A. MAIER, Appellant.— Order reversed and motion denied, with leave to plaintiff to renew motion if defendant default in payment after further demand. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

HYMAN EISENBERG, Appellant, v. HARRY LUSTGARTEN and Another, Respondents.— Order modified as stated in order entered hereon, and as modified affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

SAMUEL NEWMAN, Appellant, v. PATRICK MCGOVERN and Another, Respondents.— Order reversed, with ten dollars costs and disbursements, and motion granted to extent stated in order entered hereon. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

MORRIS SOLOMON, Appellant, v. ADOLPH H. KATES and Another, Composing the Firm of KATES BROTHERS, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

In the Matter of the Election of Directors of the REAL ESTATE OWNERS PROTECTIVE ASSOCIATION. L. VICTOR WEIL, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. LEON MARCO.— Motion granted. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. RUSSELL L. GUIPE.— Motion granted, unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. LOUIS HOFFMAN and Others.— Motion granted. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

MORLAND MORTGAGE COMPANY v. JOHN O. FISHER and Another. HENRY W. VAN WAGENER and Another v. JOHN O. FISHER and Another.— Motions granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

WILLIAM M. MARTIN v. BECK SHOE COMPANY. WILLIAM M. MARTIN

V. BECK SHOE COMPANY.— Motions granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

ABRAHAM WALD V. BETSE PERSKY.— Motion granted unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

PENNA ALCOHOL AND CHEMICAL COMPANY V. ARTHUR C. ROBERTSON.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

CATHERINE CARROLL V. THE CITY OF NEW YORK.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

DOULL MILLER COMPANY V. MAX SALMOWITZ.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

MORITZ WORMSER V. SOLOMON SILBERSTEIN.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

CHARLOTTE STERN V. THE CITY OF NEW YORK.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

PATRICK GOODMAN V. MELROSE FIREPROOF STORAGE WAREHOUSE COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

EMMA STRUFE V. NEW YORK RAILWAYS COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

ALBERT APPELL V. ANNA T. APPELL and Others.— Motion granted; question certified. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

WILLIAM A. HALBE V. SAMUEL ADAMS.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

LOUIS K. COMSTOCK V. EDGAR ELLINGER.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

BRADFORD COMPANY V. JAMES H. DUNN.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

ROBERT H. THORBURN V. DELLORA R. GATES.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK V. FRED BULL.— Motion granted. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

In the Matter of JAMES F. MAHAN.— Referred to Hon. John J. Freedman, official referee. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

HAROLD HOWARD and Others, as Trustees, v. MAXWELL-BRISCOE MOTOR COMPANY.— Motion granted; question certified. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

NATHAN FAAS V. ILLINOIS SURETY COMPANY.— Motion denied, with ten dollars costs, and stay vacated. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

App. Div.]

First Department, May, 1917.

MAX RADT v. GREELEY SQUARE HOTEL COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

In the Matter of **ZEBEGA AVENUE.**— Motions denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

In the Matter of **JOHANNES D. E. M. DE RIDDER.**— Motion granted. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

SAMUEL JOSEPH, Respondent, v. **HARRY JOSEPH** and Others, Appellants.— Appeal dismissed, without costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

In the Matter of **J. B. GREENHUT & COMPANY.**— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Smith and Page, JJ.

FEDERAL TRUST COMPANY, Respondent, v. **THOMAS CARBERRY** and Another, Impleaded with **PATRICK RYAN**, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

FORBES AND COMPANY, INC., Respondent, v. **EMERSON BUILDING COMPANY**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

EMILY SCHWAB, an Infant, by **EDWIN H. SCHWAB**, Her Guardian ad Litem, Respondent, v. **BRADLEY CONTRACTING COMPANY**, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

EVERETT P. HERVEY and Others, Copartners, etc., Respondents, v. **EDWARD J. TILYU**, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

MORRIS RUBINSTEIN and Others, Heretofore Copartners, etc., Appellants, v. **ABRAHAM WERBELOVSKY** and Others, as Executors, etc., Respondents.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

ISAAC D. COHN, Respondent, v. **HOWLETT AND HOCKMEYER CO., INC.**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

VIRGINIA KENDALL, Appellant, v. **FREDERICK SCHNAUFER**, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

ELSIE ERPF-LEFKOVICS BLUM, Appellant, v. **RICHARD BLUM**, Respondent.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

AUGUSTA LANDES, Respondent, v. **LEONARD LANDES**, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott and Davis, JJ.

JOHN MULDOON, Respondent, v. **WILLIAM P. SEAVER** and Another, Appellants, Impleaded with Another.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

First Department, May, 1917.

[Vol. 178.]

DUBOIS MANUFACTURING COMPANY, Appellant, v. ATHENS HOTEL COMPANY, Respondent.— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

JOSEF INWALD GLASS CO., INC., Respondent, v. HUGH G. FERGUSON, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Davis and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MORRIS J. WILKES, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

WILLIAM SPENCER, Respondent, v. JOHN T. WILLIAMS and Another, as Copartners, etc., Appellants.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

EDWARD F. JAMES, as Executor and Trustee, etc., of EDWARD D. JAMES, Deceased, Respondent, v. WILLIAM A. LADUE and Another, as Substituted Trustees, etc., of FREDERICK P. JAMES, Deceased, and Others, Respondents, Impleaded with CORNELIA A. JAMES and Others, Appellants.— Judgment, so far as appealed from, affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ROBERT E. STOKER, as Administrator, etc., Appellant, v. THE R. & L. COMPANY, Respondent.— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

MARIE G. GENNTISON, Appellant, Respondent, v. PHILLIP GENNTISON, Respondent, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

EDWARD SERVICE, as Administrator, etc., Respondent, v. JOHN H. FLAGLER, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

CLEVELAND TRINIDAD PAVING COMPANY, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

THOMAS PARKER COMPANY, Appellant, v. THE CITY OF NEW YORK and Others, Defendants, Impleaded with FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Respondent.— Judgment affirmed, with costs, on the authority of *Bradley & Son v. Huber Co.* (146 App. Div. 630; *affd.*, 210 N. Y. 627). Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

WILLIAM HAMPEL, Respondent, v. MOZAMBIQUE TRADING AND PLANTATION COMPANY, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

JULIUS ALBERT, Respondent, v. IRVING W. STREET and Another, Impleaded with EUGENE A. HIEBER and Others, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ANCHOR REALTY COMPANY, Appellant, v. BANKERS TRUST COMPANY, Respondent.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Transfer Tax upon the Estate of SARAH E. BATTERSON, Deceased. THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES

App. Div.]

First Department, May, 1917.

AND GRANTING ANNUITIES, as Executor, etc., Appellant; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

VERONIKA MULLER, Respondent, v. HENRY WENDT and Others, Appellants.— Judgment and order affirmed, with costs. No opinion. Present— Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

HARRY C. ZEEHAN, Respondent, v. LAZAR OLIVE, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and costs awarded by the order appealed from. No opinion. Present— Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

IRENE L. DEMUTH and Others, as Executors, etc., Respondents, v. MARGUERITE DACEY HELLMAN and Others, Defendants. In the Matter of the Application of LAWYERS TITLE AND TRUST COMPANY, Assignee of IRENE L. DEMUTH, and UNITED STATES TRUST COMPANY OF NEW YORK, as Executors, etc., of LOUIS DEMUTH, Deceased, Plaintiffs in the Above-entitled Action, to Compel ELIZABETH L. ROTHCHILD, as Purchaser of the Mortgaged Premises Sold under the Judgment of Foreclosure and Sale in Said Action, Appellant, to Complete Her Purchase.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

JAMES FAY, Appellant, v. THE HERALD COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

ROBERT REIS & COMPANY, Appellant, v. WILLIAM MOORE KNITTING COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

ROBERT REIS & COMPANY, Appellant, v. MOORE AND TIERNEY, INC., Respondent.— Order affirmed, with ten dollars costs and disbursements, No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

THE ECONOMY FUSE AND MANUFACTURING COMPANY, Appellant, v. HENRY O. LACOUNT and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

LEZZIE CONNELL, Appellant, v. EDNA W. COOLIDGE and Another, Defendants. HOWARD K. COOLIDGE, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

BENJAMIN C. MILLER and Another, Trading as B. C. MILLER & BRO., Appellants, v. SIDNEY BLUMENTHAL & CO., INC., Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

BARNEY & SMITH CAR COMPANY, Appellant, v. THE E. W. BLISS COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present— Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PATRICK BRENNAN, Appellant, v. **PHILADELPHIA AND READING COAL AND IRON COMPANY**, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

In the Matter of the Application of **SALVATORE PELELLA**, Appellant, in Proceedings Supplementary to Execution against **THE ILLINOIS SURETY COMPANY**, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

WILLIAM H. TOLMAN, Respondent, v. **AMERICAN MUSEUM OF SAFETY**, Appellant.— Order modified, as stated in order, and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

CORA L. TURNER, Respondent, v. **CHARLES W. TURNER**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

JAMES WOLFFSOHN, Respondent, v. **GOLDSMITH & Co., Inc.**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

JAMES WOLFFSOHN, Respondent, v. **GOLDSMITH & Co., Inc.**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PHILIP ELLMAN, Appellant, v. **THE CITY OF NEW YORK**, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

GLADYS TEED, an Infant, etc., Respondent, v. **FRANCIS D. GRIFFIN**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

GLENALLA REALTY CORPORATION, Respondent, v. **STARR PIANO COMPANY**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

EDWARD S. CHILD, Respondent, v. **SAMUEL W. RUSHMORE**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK V. JOSEPH ZUCCARO.— Motion to dismiss appeal granted. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

In the Matter of **HENRY RUTHERFORD**, Deceased.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

CORA L. TURNER V. CHARLES W. TURNER.— Motion to dismiss appeal denied. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

MARY O'BRIEN V. THE CITY OF NEW YORK.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms stated in order. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PETER DUFFY V. CHARLES L. AMENT.— Motion to dismiss appeal granted,

App. Div.]

First Department, May, 1917.

unless appellant comply with terms stated in order. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PETER DUFFY v. CHARLES L. AMENT.— Motion to withdraw appeal granted on payment of ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

FRANCIS BENDELARI v. WHYTE'S, INC.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PICTORIAL REVIEW COMPANY v. LOUIS ORANSKY and Others.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

WILLIAM G. KOHN v. WALTER H. WARNER, Impleaded, etc.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PETER K. HESSLER v. NEW YORK RAILWAYS COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

METER MINTZ v. SAMUEL DORFMAN and Others.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

MORRIS BRUH v. JOSEPH ZIMIT.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

MARY SCHATZ v. ABRAHAM HIRSCHHORN and Others.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

W. L. FLEISCHER & COMPANY, INC., v. PAUL GERLI.— Application granted. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

GURNEY ELEVATOR COMPANY v. F. F. PROCTOR MT. VERNON REALTY COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

HARRY ALTMAN and Others v. WILLIAM KINSTLER and Others.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

MINNIE STAMP v. EIGHTY-SIXTH STREET AMUSEMENT COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

ROWLAND W. SPAIN v. MANHATTAN SHIRT COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

SAMUEL C. DALRYMPLE v. MOSES SCHWARTZ.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

HENRY I. CLARK and Others v. BANKERS TRUST COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

KOBRE ASSETS CORPORATION v. HYMAN D. BAKER.— Motion for reargu-

ment denied. Motion for leave to appeal granted; question certified. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

PENNINGTON WHITEHEAD v. MARIA H. DEHON POLK and Others.— Motion for preference granted for June 5, 1917. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

CENTRAL TRUST COMPANY v. ALBERT FALCK and Others.— Motion for stay granted, on condition that appeal be taken and perfected within thirty days. Order to be settled on notice. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

In the Matter of **SAMUEL S. FIELD and Others.**— Motion granted. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

JESSE L. LASKY v. MINERVA COVERDALE and Others.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

In the Matter of **HENRY B. HART, Deceased.**— Motion for preference granted for June 5, 1917. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. KINGS COUNTY LIGHTING COMPANY v. OSCAR S. STRAUS and Others.— Motion for preference granted for June 5, 1917. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

In the Matter of **EMANUEL J. LIVINGSTON, an Attorney.**— Motion for commission denied, without prejudice to renewal if attendance of witness cannot be obtained within this State. Order to be settled on notice. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GERTRUDE CRANE v. WILLIAM C. ORMOND and Others.— Motion granted. Present — Clarke, P. J., Dowling, Smith, Page and Shearn, JJ.

FERRAL C. DININNY, Appellant, v. JAMES S. REAVIS and Others, Respondents.— Judgment affirmed, with costs, on opinion of Page, J., at Special Term. (Reported in 100 Misc. Rep. 316.) Present — Clarke, P. J., Scott, Smith and Davis, JJ.; Scott, J., dissented.

SECOND DEPARTMENT, MAY, 1917.

FREDERICKA WICHMAN, Respondent, v. NEW YORK CONSOLIDATED RAILROAD COMPANY, Appellant.

Railroad — negligence — fall on stair.

Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 18th day of October, 1916, in favor of the plaintiff.

JENKS, P. J.: The contention that the plaintiff fell in consequence of defects in the stairway, rests almost altogether upon the testimony of her daughter, who admits that she did not ascribe the fall to such defects until

App. Div.]

Second Department, May, 1917.

the day after the accident, when she returned to view the stairs. Moreover, she arrives at the cause of the fall by a process of exclusion. The daughter is flatly contradicted by nine witnesses, of whom almost all looked at the stairway immediately after the accident, for the purpose of discovering any defects therein. Of these nine, one was a disinterested passenger who was following the plaintiff in her descent, another was an employee of the department of bridges, and three were members of the police force, who gave official attention to the accident. The other witnesses were employees of the defendant, but one of them had left such employment before the trial. There is nothing that indicates that any witness called by the defendant was a deliberate falsifier. So far as the employees are concerned, while their relations to the defendant could have been considered properly by the jury in weighing the testimony, it must be remembered that these employees were corroborated by the apparently disinterested witnesses called by the defendant. We think that the verdict is against the weight of the evidence, and that, therefore, there should be a new trial. Stapleton, Mills, Putnam and Blackmar, JJ., concurred. Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MAUDE H. SYLVESTER, Appellant.

Crime — soliciting — evidence.

Appeal by the defendant from a judgment of the County Court of Kings county, entered in the office of the clerk of said county on the 18th day of October, 1916, affirming a judgment of conviction rendered in the First District Magistrate's Court, in the borough of Brooklyn, city of New York.

PER CURIAM: The magistrate afforded to the defendant every right assured to her by procedure, not merely in a formal way, but with full explanation thereof. He was courteous and considerate and deserves nothing but commendation for his conduct of the proceedings and of the trial. The magistrate suspended sentence. We think that the case for the People left it doubtful whether the defendant broke that provision of section 887 of the Code of Criminal Procedure that deals with solicitation, upon which she was arraigned and tried. In view of this uncertainty, and of the statements of the defendant, whose denials were not so sweeping in every respect as to arouse suspicion as to their truth, and of the unquestioned proof of her high character, we have concluded to reverse the judgment. The folly of the woman was self-confessed, but her criminality was not proven by the weight of evidence. The judgment of the County Court of Kings county that affirmed the conviction in the Magistrate's Court is reversed, and the conviction by the magistrate is reversed, and the defendant is discharged. Jenks, P. J., Stapleton, Mills and Blackmar, JJ., concurred; Thomas, J., dissented. Judgment of the County Court of Kings county that affirmed the conviction in the Magistrate's Court is reversed, and the conviction by the magistrate is reversed, and the defendant is discharged.

In the Matter of the Petition of HENRY FELDMAN for Letters of Administration, etc.—Motion granted, without costs. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

PETER J. NORTON, Respondent, v. SPRINGFIELD, LONG ISLAND, CEMETERY SOCIETY, Appellant.—The motion for stay is denied, although we regard it important that the trial court consider whether the certificates are in accordance with the statute, and that the plaintiff should not recover a judgment that is enforceable to the prejudice of the mortgagees or the other certificate holders or lot owners. The Trial Term has the duty of determining whether the certificates should be reformed and in what regard; or, if that cannot be done without bringing in additional parties, the court has power to suspend the trial until such parties shall have been brought in. Present—Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

RAMAPO MOUNTAINS WATER, POWER AND SERVICE COMPANY, INC., v. COMMISSIONERS OF THE PALISADES INTERSTATE PARK, Appellants. (Appeals No. 1 and 2.)—Motions denied, without costs. If any new facts have arisen since the action was begun, which the plaintiff claims, that change the legal status, they can be made the subject of the new action. Present—Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

TOWN OF BROOKHAVEN, Respondent, v. SAMUEL F. ROBINSON, Appellant.—Motion denied, with ten dollars costs. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

CATHERINE BLIGH, Respondent, v. NATHAN STRAUS and Others, Appellants.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

DOMINICK BLIGH, Respondent, v. NATHAN STRAUS and Others, Appellants.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

GEORGE F. BURCHELL, Appellant, v. RICHARD W. BURCHELL and Others, Defendants, Impleaded with RICHARD W. BURCHELL and AUSTIN B. BURCHELL, as Executors, etc., Appellants, and EDGAR L. MORRISON, Respondent.—Order affirmed, with ten dollars costs and disbursements, upon the opinion of Mr. Justice Cropsey at Special Term. (Reported in 96 Misc. Rep. 600.) Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Respondent, v. THOMAS O. THACHER, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Mills, Rich and Putnam, JJ., concurred; Jenks, P. J., not voting.

MICHAEL KILLILEA, Respondent, v. J. PIERPONT MORGAN, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Stapleton, Mills and Rich, JJ.

OBERMEYER & LIEBMANN, Appellant, v. WILLIAM F. KENNEDY, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

LEON OLSZEWSKI and Another, Appellants, v. ANDREW KOLINSKI,

App. Div.]

Second Department, May, 1917.

Respondent, and Others, Defendants.— Order modified so as to permit the plaintiffs to plead over on payment of costs; and as so modified affirmed, without costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred. Order to be settled before the Presiding Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ALFRED E. RICHARDSON, Appellant.— Judgment of conviction of the County Court of Kings county affirmed. No opinion. Jenks, P. J., Thomas, Stapleton and Putnam, JJ., concurred; Carr, J., not voting.

FRANK RAVOLD, Appellant, v. LOUISE J. HAMM, as Administratrix, etc., and Another, Respondents, Impleaded with Others.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

NATHAN A. SEAGLE, as Executor, etc., of ANNIE J. DADÉ, Deceased, Respondent, v. JOHN D. BARRETO, Appellant.— Interlocutory judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

MARVIN SHIEBLER, Suing for Himself, etc., Taxpayers of Suffolk County, New York, Appellant, v. EDWARD H. L. SMITH and Others, Individually and Together as Composing the Board of Supervisors of Suffolk County, New York, Respondents.— Collusion, the gravamen of the action, not being proved, it is unnecessary at the suit of this plaintiff, to decide the legality of the audit or payment, and the judgment is affirmed, with costs, on authority of *Daly v. Haight* (170 App. Div. 469). Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

SAMUEL J. BELFER, Respondent, v. THE CITY OF NEW YORK, Appellant.— Plaintiff's motion to dismiss appeal denied. If plaintiff promptly serves his amendments, the case can be settled and then placed on the May calendar as previously ordered. If the case be not settled by reason of any delay or omission of the plaintiff, the case may go on the June calendar. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

SAMUEL J. BELFER, Respondent, v. THE CITY OF NEW YORK, Appellant.— Defendant's motion to compel plaintiff to accept the second notice of appeal is denied as unnecessary. Defendant's proposed case on appeal served on April twenty-eighth was in accordance with our order of April thirteenth, and should have been received. Present — Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

JOSEPH P. CARNEY, Appellant, v. PENN REALTY COMPANY, Respondent.— Motion denied upon condition that the appellant perfect the appeal, place the case on the June calendar and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

JOSEPH M. CURRY and Another, Copartners, etc., Respondents, v. JOHN ZITELLI and Another, Appellants.— Motion denied on condition that appellants' surety justify within five days, that thereupon the appeal be perfected, the case placed on the June calendar, and made ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

AARON HOROWITZ, Respondent, v. SOPHIE COHEN, as Administratrix, etc., Appellant.— Conditional upon compliance with the order of restitution, the motion is granted, without costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

In the Matter of the Probate of the Last Will and Testament of HENRY R. HOWELL, Deceased.— Motion denied on condition that appellant file and serve the undertaking within ten days after entry of the order; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

In the Matter of HUGH KENNEY, Deceased.— Motion denied, without costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

HERMAN A. KLATT, Respondent, v. EMILIE KLATT, Appellant.— Motion denied, without costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

LUCY MADDEN, an Infant, by JOHN MADDEN, Her Guardian ad Litem, Respondent, v. NICHOLAS AVITABILE, Appellant.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

ROSE MEGUIN, Respondent, v. MARY BUEHLER, Appellant.— Motion denied, on condition that appellant perfect the appeal, place the case on the June calendar and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

MICHAEL J. MURPHY, Appellant, v. YONKERS NATIONAL BANK, Respondent.— Motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM H. HALE, Appellant.— Motion denied, without costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MAURO SIMONE, Appellant.— Motion denied. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

THE PEOPLES TRUST COMPANY, Appellant, v. PATRICK H. FLYNN and Others, Defendants. HAMILTON TRUST COMPANY, Respondent; LEANDER B. FABER, as Receiver, etc., Appellant.— Motion granted solely upon the question of the priority of the liens and case set down for Monday, June 4, 1917. Present — Thomas, Stapleton, Mills and Rich, JJ.; Jenks, P. J., not voting.

J. BENEDICT ROACHE, Appellant, v. PATRICK H. FLYNN and Others, Defendants. HAMILTON TRUST COMPANY, Respondent; LEANDER B. FABER, as Receiver, etc., Appellant.— Motion granted solely upon the question of the priority of the liens, and case set down for Monday, June 4, 1917. Present — Thomas, Stapleton, Mills and Rich, JJ.; Jenks, P. J., not voting.

MYRTLE STANTON, Appellant, v. MALCOLM ROSS MATHESON, Individually and as Trustee, etc., Respondent.— Motion denied, with leave to appellant

App. Div.]

Second Department, May, 1917.

to resettle the order and upon condition that appellant perfect the appeal, place the case on the June calendar and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

JOSEPH ZIMIT, Respondent, v. SARAH CHAITMAN and Others, Appellants. — Motion denied. The permission to plead relates only to the matters under decision in this court and resettlement of the order is not necessary. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

SOLOMON ZWEIG, as Administrator, etc., Appellant, v. HENRY J. GLASSER, Respondent. — Motion denied on condition that appellant perfect the appeal, place the case on the June calendar and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

JENNIE BIDERMAN, an Infant, etc., by JULIUS BIDERMAN, Her Guardian ad Litem, Respondent, v. WILLIAM C. GRIMMEL and ABRAHAM H. HAMEL, Copartners, etc., Appellants. — Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

JAMES J. CROZIER and All Others, etc., Taxpayers of the Town of Islip, Suffolk County, New York, Appellants, v. JAMES F. RICHARDSON and Others, Respondents. — In an action to enforce restitution and recovery, at the suit of a taxpayer, for collusive audit or payment, collusion is the gravamen of the action. Collusion not being proved, it is unnecessary in this action to decide the legality of the claims. The judgment is affirmed, with costs, on authority of *Daly v. Haight* (170 App. Div. 469). Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

ESTATES OF HAVEMEYER POINT, Respondent, v. BRITISH AMERICA ASSURANCE COMPANY, Appellant. — Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

SAMUEL HANESS, Appellant, v. PAULINE HANESS, etc., Respondent. — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

WILLIAM S. HURLEY, Appellant, v. PITTSBURGH PLATE GLASS COMPANY, Respondent. — Judgment reversed, and upon new findings by this court, plaintiff decreed to recover for value of his collateral applied by defendant after it had satisfied its mechanic's lien. Having filed a lien for \$1,479.90, such lien became security for this debt, although the debtor had then become bankrupt and the plaintiff as guarantor, in ignorance of this lien, had afterwards advanced other collateral. In this suit defendant had the burden of justifying a discharge of its lien for only \$656.90, since this rendered valueless the lien to which plaintiff had a right to be subrogated. (*Guild v. Butler*, 127 Mass. 386, 390.) Under familiar equitable principles, a surety can recover back collections from his property after he has learned that the creditor's acts have discharged his liability. (*Chester v. Kingston Bank*, 17 Barb. 271; 16 N. Y. 336.) Plaintiff, therefore, is entitled to repayment of the \$1,022.68 collected from his assigned security, with interest

Second Department, May, 1917.

[Vol. 178.]

and costs in both courts. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred. Order to be settled with findings, on notice before Mr. Justice Putnam.

In the Matter of the Appraisal, under the Acts in Relation to the Taxable Transfers of Property, of the Estate of WILLIAM R. HARRIS, Deceased. FLORENCE MARY HARRIS and Others, as Executors, etc., and Others, Appellants, Respondents; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent, Appellant.— Order of the Surrogate's Court of Westchester County affirmed, without costs to either of the parties. No opinion. Jenks, P. J., Thomas, Rich and Putnam, JJ., concurred; Carr, J., not voting.

In the Matter of the Petition of JOHN H. O'DONNELL, as Successor Trustee, etc., of JAMES O'DONNELL, Deceased, and OLIVIA C. O'DONNELL, Cestui Que Trust, Respondents, for Leave to Sell the Real Property of JAMES O'DONNELL, Deceased. JAMES J. O'DONNELL and Others, by PETER CONDON, Their Guardian ad Litem, Appellants.— Final order reversed on argument, without costs and motion denied, without costs, on authority of *Matter of Easterly* (202 N. Y. 466). Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

In the Matter of the Application of the PUBLIC SERVICE COMMISSION OF THE FIRST DISTRICT OF THE STATE OF NEW YORK, etc., Relative to Acquiring Title, etc. (Atlantic and Flatbush Avenues.) HENRY DEGROOT ROBINSON, Appellant; SCHULTE REALTY COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

In the Matter of the Petition of CHARLES E. THEDFORD, as Administrator, etc., of MARIE A. STOUFFER, Deceased, Respondent, to Compel ADELE L. ROUYON to Render and Settle Her Account as Administratrix, etc., of ALPHONSE ROUYON, Deceased. ADELE L. ROUYON, as Administratrix, etc., Appellant.— Order of the Surrogate's Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

DORA JOHNSON, as Administratrix, etc., of CHARLES JOHNSON, Deceased, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the recovery of damages to the sum of \$15,000; in which event the judgment as so modified and the order are unanimously affirmed, without costs. The decedent was thirty-four years of age when he met his death. According to the tables introduced in evidence, he had an expectancy of life of about thirty years. He left a widow and two sons, the eldest about five years of age at the time of his father's death, and the youngest about sixteen months. According to plaintiff's testimony, he brought home for her support from twenty dollars to twenty-five dollars a week on an average, although he sometimes earned more. As matter of fact, while in the employ of the city he had earned something like \$1,100 a year. The money which he earned was devoted, not only to the support of his widow and children, but to his own support; and as there were four in the family, it cannot reasonably be assumed that more than

App. Div.]

Second Department, May, 1917.

three-fourths of his earnings were devoted to the support of his wife and children. Assuming that he devoted \$900 a year to their support, which is probably much more than the actual amount, the present value of an annuity of that amount, computed according to the Northampton Tables, would be \$11,360; according to the Carlisle Tables, \$12,834. If we add to this a reasonable amount for possible increased earning capacity, or other elements of pecuniary loss, which cannot be mathematically computed, and for the present diminished purchasing power of money, we think that \$15,000 would be as large a verdict as can be sustained upon the record. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

OLAF JORGANSBORG, Appellant, v. LUMBER OPERATING AND MANUFACTURING COMPANY, Respondent.— Judgment unanimously affirmed, without costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

LEA LEWIS, Appellant, v. THE CITY OF NEW YORK and BROOKLYN HEIGHTS RAILROAD COMPANY, Respondents.— Where the municipality opens a street line, like Tompkins avenue, to lay a sewer, and removes the car tracks to excavate during the work, the street railroad company which had previously maintained the pavement under section 178 of the Railroad Law,* is not liable for the condition of the pavement while the city carries on the work. (*Swift v. Brooklyn Heights R. R. Co.*, 134 App. Div. 134.) Here, however, the railroad company had relaid its tracks, and it did not appear that at this place the city was continuing its filling or grading. The requirement of prior notice of the existence of a defect in order to charge the municipality applies to defects arising from acts of third persons, or from wear and tear. There is not such a prerequisite to liability of the city from surface conditions left in a street after excavations made by the city's contractors, conducted under its supervision. (*Brusso v. City of Buffalo*, 90 N. Y. 679.) The complaint having been dismissed at the close of plaintiff's proofs, the relations between the defendants are not clearly shown, but sufficient appeared to put on them the *onus* of showing that this hole at the crosswalk, close to the rails, had existed without any negligence by such defendant. (*Wilson v. City of Watertown*, 3 Hun, 508; *Dale v. City of Syracuse*, 71 id. 449; *Hoyer v. Village of North Tonawanda*, 79 id. 39.) Judgments reversed and new trial granted, with costs to plaintiff to abide the event. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

NICHOLAS D. MAGRATH, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the recovery of damages to the sum of \$15,000; in which event the judgment as so modified and the order are unanimously affirmed, without costs. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

* See Consol. Laws, chap. 49 (Laws of 1910, chap. 481), § 178, as amd. by Laws of 1912, chap. 368.— [REp.]

JAMES F. MINER, Respondent, v. CHRISTOPHER REMST, Appellant.—The reversal of the judgment (See 178 App. Div. 173) disposes of this appeal from the order denying defendant's motion for a new trial. This appeal is, therefore, dismissed, without costs. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

FREDERICK R. MITCHELL, Respondent, v. ADDIE FLORENCE (Mrs. C. W.) BURROUGHS, Appellant.—Judgment and order of the County Court of Dutchess county unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH BEHAN, Appellant.—Judgment of conviction of the County Court of Kings county affirmed by default. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CLAUS BLOCK, Appellant.—Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH GREGORY, Appellant.—Judgment of conviction and order affirmed. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES E. HOPPE, Appellant.—Judgment of conviction of the County Court of Queens county affirmed by default. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH LeBOY, Appellant.—Judgment of conviction of the County Court of Kings county affirmed by default. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ARTHUR PLAUT, Appellant.—Judgment of conviction affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent v. JOSEPH SULLIVAN and JAMES R. PRICE, Appellants.—Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

In the Matter of the Application of **THE PEOPLE OF THE STATE OF NEW YORK** ex rel. **GEORGE REA, Respondent, for a Peremptory Writ of Mandamus against WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, Appellant.**—Order for peremptory writ of mandamus affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

ELIZABETH B. REILLY, Respondent, v. EDWARD J. REILLY, Appellant.—Order affirmed, with ten dollars costs and disbursements, upon the grounds (a) that it appears that the justice presiding at the Special Term took oral proof, which is not contained in this record; and (b) that the direction in such order for payment of the alimony accruing since the demand was made

App. Div.]

Second Department, May, 1917.

only as a condition of the defendant's being purged of the contempt arising from his failure to pay as demanded. The order leaves to a future application the question of punishment for such contempt if defendant fail to purge himself thereof, and it cannot be anticipated that such final order, if it has to be made, will include such subsequent alimony in the fine. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

CARMINE SACCRIPANTE, Respondent, v. PHILADELPHIA AND READING COAL AND IRON COMPANY, Appellant.— Judgment and orders unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

HAROLD H. SMITH, an Infant, by WILLIAM LORD, His Guardian ad Litem, Respondent, v. ERIE RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed on reargument, with costs. (See 176 App. Div. 937.) No opinion. Present — Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

MARY SMITH, Respondent, v. SOLOMON VAN ETEN TURNER, an Adjudged Incompetent, and CHARLES W. SNYDER, as Committee of His Person and Property, Appellants.— Judgment and order affirmed, without costs. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

TITLE GUARANTEE AND TRUST COMPANY, Respondent, v. QUEENS LAND AND TITLE COMPANY, Appellant, and Others, Defendants.— The amount of the obligation of the defendant, the Queens Land and Title Company, was measured by the note and the amount paid on the prior mortgage; it was not increased by the sale of the collateral bought in by the pledgee, especially in view of the fact that the sale of the collateral was made with consent of all parties in interest, not for the purpose of realizing thereon, but to comply with the suggestion of the plaintiff that a form of sale be gone through with in order that a new mortgage might be given directly to the trust company. In *Duncomb v. N. Y., H. & N. R. R. Co.* (84 N. Y. 190) there were many bondholders, and the decision that pledgees might prove in the foreclosure proceedings for the face of the bonds which they held as collateral, was for the purpose of adjusting the relative rights of the bondholders. Here there were no bondholders but the trust company. The bonds pledged as between the pledgor and pledgee still holding them, carried no obligation in excess of the debt which they were pledged to secure. The subsequent dealings between the parties were not intended to and did not increase the amount of the debt owing by the Queens Land and Title Company to the Kings County Trust Company, except, perhaps, by the amount which the trust company paid on the prior mortgage. Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, unless within ten days plaintiff and the defendant the Kings County Trust Company stipulate to modify the judgment *nunc pro tunc* by reducing the amount to \$245,619.50, with interest at six per cent from March 28, 1916, in which event the order is affirmed, without costs. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred. Order to be settled before Mr. Justice Blackmar.

Second Department, May, 1917.

[Vol. 178]

JOSEPH WAISIKOSKI, Appellant, v. **PHILADELPHIA AND READING COAL AND IRON COMPANY**, Respondent.—Judgment and order affirmed, with costs. No opinion. **Jenks, P. J., Thomas, Rich and Putnam, JJ.**, concurred; **Mills, J.**, dissented upon the ground that jurisdiction is absolutely imposed upon the court by section 1780 of the Code of Civil Procedure, and, therefore, the court had no discretion to decline to exercise it.

BENJAMIN GOLDENBERG, Respondent, v. **HYMAN JACOBSON and BESSIE JACOBSON**, Appellants.—Motion denied, without costs, on condition that plaintiff within ten days give a surety company bond in the sum of \$250, conditioned to pay all damages, not exceeding the sum above mentioned, which defendants may sustain by reason of the injunction, if it be finally decided that plaintiff is not entitled thereto or the action be dismissed or discontinued. If such bond be not so given, the motion is granted, with ten dollars costs. Present — **Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.**

In the Matter of the Application, etc., on Complaint of **WILLIAM K. FIELD**, v. **RALPH FORMAN**, as Trustee of the Village of Hempstead, etc.—Motion denied, with ten dollars costs, upon authority of *People v. Gregg* (59 Hun, 107). Present — **Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.**

In the Matter of the Application of **ELMONT B. HAZARD** for Admission to the Bar.—Application granted. Present — **Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.**

In the Matter of **ROBERT S. KING**, an Attorney.—The situation is not changed by the testimony taken on the second reference. We must adhere to our decision made on the 29th of September, 1916 (See 174 App. Div. 930), on the former report of the official referee, and an order is now entered confirming the reports of the referee, and disbarring the respondent. Present — **Thomas, Stapleton, Rich, Putnam and Blackmar, JJ.**

In the Matter of Supplementary Proceedings: **RAY REISENBURGER** and **LOUIS J. ALTKRUG**, Respondents, v. **ISAAC CORSUN**, Appellant.—Motion for stay granted, on condition that appellant give a bond in the sum of \$250 to pay the costs of the appeal, if any be awarded against him, and hold himself within the State amenable to the process of the court and place the case upon the calendar for the first day of the June term. Present — **Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.**

MICHAEL KILLILEA, Respondent, v. **J. PIERPONT MORGAN**, Appellant.—Motion for leave to appeal to the Court of Appeals denied, without costs. Present — **Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.**

CELIA LYON, Respondent, v. **THOMAS GILLERAN and Others**, Appellants.—Motion granted, on condition that appellants perfect the appeal, place the case on the calendar for June fifth and be ready for argument when reached, and stipulate to try the cause at the June Equity Term, without further notice, if the order be reversed in that month; otherwise, motion denied, with ten dollars costs. Plaintiff may move to vacate defendant's stay, should she stipulate to vacate the order of reference, and place the cause on the June calendar for trial. Present — **Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.**

App. Div.]

Second Department, May, 1917.

GEORGE MICHEL, Respondent, v. WALTON TOY COMPANY, Appellant.— Motion granted, without costs. Present — Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.

GEORGE BULLOCK, Respondent, v. JAMES S. COOLEY, District Superintendent of Schools of the First Supervisory District of Nassau County, and Others, Appellants, and Others, Defendants.— Order affirmed on argument, without costs, and without passing upon the merits of the question of law presented by the litigation. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred. Order to be settled before the presiding justice.

COOPER COMPANY, Respondent, v. JACOB WOLF and Another, Defendants, Impleaded with BERNARD NAUMBURG and ELSA H. NAUMBURG, Appellants.— While the discontinuance of the foreclosure suit after entry of final judgment may not always obviate applying for leave under Code of Civil Procedure, section 1628, to bring an after-suit, these appellants are not in a position to raise that objection. Bernard Naumburg assented to the discontinuance, which also could not have aggrieved the appellant Elsa H. Naumburg, as she was not a party to the foreclosure, the summons not having been served upon her, and, therefore, she is not put to the expense of a double litigation. The judgment is, therefore, affirmed, with costs. Jenks, P. J., Thomas, Stapleton and Putnam, JJ., concurred; Blackmar, J., concurred in result.

FENTON F. CRAFT, Respondent, v. FRANK KNASS and Others, Appellants.— Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

MARIA FIGLIOLINI, Appellant, v. BUSH TERMINAL BUILDINGS COMPANY, a Corporation, Respondent, and Another, Defendant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

THOMAS O'ROURKE GALLAGHER, Appellant, v. ABNER C. SURPLESS and JAMES M. GALLAGHER, Respondents.— Discontinued, with costs. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

SARAH V. HAMILTON, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

WILLIAM H. HAMILTON, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

BECKIE HECKER, as Administratrix, etc., Appellant, v. OCEAN ELECTRIC RAILWAY COMPANY, Respondent.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

WOLF HIRSCH, as Administrator, etc., of CHARLES HIRSCH, Deceased, Appellant, v. JOHN RANDOLPH GILES, Respondent.— Order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

WALLACE HUNT and FLORENCE E. HUNT, Respondents, v. HENRY G. K. HEATH, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion for new trial granted, upon authority of *Lamphear v. MacLean* (176 App. Div. 473). Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

WALLACE HUNT and FLORENCE E. HUNT, Respondents, v. HENRY G. K. HEATH, Appellant, and Others, Defendants.—Judgment and order reversed, and new trial granted, costs to abide the final award of costs. (See *Hunt v. Heath, supra*, p. 934, decided herewith.) Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of THEODORE F. CLARK, Deceased. JENNIE CLARK, Respondent, v. GRACE C. JOHNSON, Appellant.—Decree of the Surrogate's Court of Queens county affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

LEONORA KNOBLOCK, Appellant, v. EDWARD F. STRINGER and Another, Respondents.—Judgment affirmed, without costs. The findings of fact are amended by adding the following: In consideration of the conveyance, the defendants agreed to pay for the support and maintenance of plaintiff and her husband during their respective lives, and to pay their funeral expenses when they died, to the extent that such support and maintenance should be necessary. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

JOSEPH LEVY, Respondent, v. GERTRUDE HOROWITZ, Appellant.—Judgment and order of the County Court of Kings county unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

BERNARD MARTIN, as Administrator, etc., of SARAH MARTIN, Deceased, Respondent, v. LOUIS ROSENGARTEN, Appellant, and BERT GADDIS, Defendant.—Judgment and order unanimously affirmed by default, with costs. Present—Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.

ELIZABETH MARTIN, Respondent, v. LOUIS ROSENGARTEN, Appellant, and BERT GADDIS, Defendant.—Judgment and order unanimously affirmed by default, with costs. Present—Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.

JOHN T. MOHR, Respondent, v. OTTO A. GILLIG and ANNAONE COMPANY, INC., Appellants.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

HARRY E. MORROW, Respondent, v. THE GLOBE-WERNICKE COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY JACOBS, Respondent, v. JOHN T. FETHERSTON, Commissioner of the Department of Street Cleaning of the City of New York, and as President and Trustee of the Relief and Pension Fund of the Department of Street Cleaning, Appellant.—Orders affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

App. Div.]

Second Department, May, 1917.

GILBERT B. ST. JOHN, Respondent, v. SAMUEL BESKIN, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the verdict was excessive, unless within ten days plaintiff stipulate to reduce the recovery to \$3,000, in which event the judgment as so modified, and the order, are unanimously affirmed, without costs. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

In the Matter of the Petition of HENRY FELDMAN for Letters of Administration on the Goods, etc., of SOLOMON FRIEDMAN, Deceased.— Motion denied, without costs, and without prejudice to a renewal of the same before the surrogate. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

MAX MEYER, Respondent, v. UNITED DRESSED BEEF COMPANY, Appellant.— Motion denied. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

GEORGE MICHEL, Respondent, v. WALTON TOY COMPANY, Appellant.— Motion denied. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FREDERICK E. WEEKS, District Attorney for the County of Westchester, Relator, v. The Honorable WILLIAM P. PLATT, Justice of the Supreme Court, etc., and THOMAS M. OSBORNE, Respondents.— This motion will be denied and the stay vacated, and an order will be entered, denying this motion and vacating the stay on the 1st day of June, 1917. We defer action until that time in order that the district attorney of Westchester county may take any action meanwhile of which he is advised. Present — Thomas, Stapleton, Mills and Putnam, JJ.

MARION RINGELMANN, an Infant, by BERTHA H. RINGELMANN, Her Guardian ad Litem, Respondent, v. OSCAR DANIELS COMPANY, Appellant.— Motion for reargument denied, with ten dollars costs. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

MARY E. S. TURBILL, as Executrix, etc., of SARAH L. STILSON, Deceased, Plaintiff, v. PIERREPONT DAVENPORT, Defendant.— Motion denied, without costs. Present — Jenks, P. J., Mills, Rich and Putnam, JJ.

JOHN DUNSMURE, Respondent, v. HOTEL SHELBURNE, INC., Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.

ROSE E. FLAXMAN, Respondent, v. THE CITY OF NEW YORK, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

HARRY P. GOLDSBOROUGH, Respondent, v. THUSNELDA STAAB and EFFIE O. STAAB, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion for judgment on the pleadings dismissing the complaint granted, with leave to respondent to plead anew within twenty days upon payment of ten dollars costs. (*People ex rel. Batchelor v. Bacon*, 37 App. Div. 414.) Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

Second Department, May, 1917.

[Vol. 178]

MARY HEAD, as Administratrix, etc., of JOHN LANDY, Deceased, Appellant, v. THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, Respondent.—Order of the City Court of Yonkers affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

THOMAS J. KAVANAGH, as Trustee in Bankruptcy of LONG ISLAND CONTRACTING AND SUPPLY COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.—Judgment and orders reversed and new trial granted, costs to abide the event, upon the grounds (a) that plaintiff was in any event entitled to recover the expense incurred in procuring and furnishing the bond, amounting to \$150, and (b) that plaintiff was entitled to prove the various acts of the public officials which constituted the breach of the contract, by making the radical change in the street improvement which made the doing of plaintiff's contract work impossible, so as to prove the date of such breach, as that date was not admitted by the defendant and was material in determining whether or not plaintiff's claimed other expenses were reasonably incurred. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

GEORGIANA G. MAXWELL, etc., Appellant, v. SUSAN C. HOGE and Others, Respondents.—We think the proper construction of the will of Margaret J. Maurice, deceased, is that it gave to her incompetent sister, Sarah, as much of the income as was "required or necessary" for her "proper care, comfort, maintenance and support." That amount did not rest in the uncontrolled discretion of the trustees, but was capable of judicial ascertainment, and the amount was determined by the order of the court in the incompetency proceedings to be \$300 per month. It follows that under all the circumstances the will must be construed as devoting to the use of the beneficiary, Sarah, the income of the estate up to \$300 per month. (*Rudland v. Crozier*, 2 DeGex & Jones, 143; *Forman v. Whitney*, 2 Abb. Ct. App. Dec. 163.) But whatever rights either plaintiff or the administratrix of the estate of Sarah E. Maurice might draw from this construction of the will are lost by the adjudication of the Surrogate's Court on the accounting of the executors of Margaret J. Maurice, deceased, and of the Supreme Court, in *Hoge v. Babcock*. Judgment affirmed, with costs. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

ANNA MARGARETHA RATZ, Respondent, v. ERHART HUMMERICH and LINA HUMMERICH, Appellants, and Another, Defendant.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ., concurred.

ANNA MARGARETHA RATZ, Respondent, v. ERHART HUMMERICH and LINA HUMMERICH, Appellants.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ., concurred.

JOSEPH ZUARO, Respondent, v. SAMUEL MOSKOWITZ, Appellant, and Others, Defendants.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

App. Div.]

Third Department, May, 1917.

Decisions by the Presiding Justice on Applications to Appeal from the Appellate Term.

JOSEPH CARLOMAGNO, Respondent, v. NICHOLAS COOK and JOHN HOWARD, Appellants.— Application denied, with ten dollars costs.

JOHN J. HAUFF, Respondent, v. MAX KALMANOR, Appellant.— Application denied, with ten dollars costs.

ROBERT GAIR COMPANY, Respondent, v. THE G. H. HARRIS COMPANY, Appellant.— Application denied, with ten dollars costs.

MAE SCULLY, Respondent, v. HENRY J. PAULSEN and Another, Appellants.— Application granted.

WILLIS VAN VALKENBURGH, Plaintiff, v. JAMES C. BISHOP, Defendant.— Application denied, with ten dollars costs.

HENRY WEIR, Respondent, v. MARGARET HOLLAND, Appellant.— Application denied, with ten dollars costs.

THIRD DEPARTMENT, MAY, 1917.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PAVILION NATURAL GAS COMPANY, Relator, v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Respondent.

Public Service Commission—natural gas company laying pipes in country.

Certiorari issued out of the Supreme Court on the 2d day of August, 1916.

Determination of the Public Service Commission confirmed, with fifty dollars costs and disbursements. All concurred, except Kellogg, P. J., who dissented in memorandum, in which Lyon, J., concurred.

KELLOGG, P. J. (dissenting): The company is required to extend its pipes 1,000 feet beyond the limits of the village of Moscow and furnish natural gas for the use of the petitioner's farm. The company is to furnish the pipe, the petitioner to pay the expense of laying it. Under the agreement between the town of Leister, in which the farm is, and the company, for laying its main through the town to the village of Moscow, the company is to furnish to all the inhabitants of the town, "in front of whose premises such gas mains shall be laid, such gas as said inhabitants may require for lighting, heating, and manufacturing," etc. The expense of the connection, however, is to be paid by the consumer. The company's mains in the town do not run in front of or near the premises of the petitioner, but are a mile and one-quarter distant at the nearest point. Undoubtedly, under the agreement, and under section 62 of the Transportation Corporations Law* and subdivision 2 of section 66 of the Public Service Commissions Law,* the Commission may require gas to be furnished any farm along-

* Consol. Laws, chap. 63 (Laws of 1909, chap. 219), § 62; Consol. Laws, chap. 48 (Laws of 1910, chap. 480), § 66, subd. 2.— [REP.]

side of the transmission line. The Transportation Corporations Law (§ 62) limits the right to compel such service for a distance not exceeding 100 feet from the existing mains. It must be conceded that if the public convenience and necessity require the pipe to be placed in the town highway alongside of the petitioner's premises, the Commission may direct it; but there is no allegation that any other person upon that highway desires the use of the pipe aside from the petitioner. The order shows it is for his use, and he is required to install it. Under subdivision 2 of section 66 the Commission may order "reasonable * * * extensions of the works," etc. It cannot order an unreasonable extension, and a reasonable extension is one in the interests of the public or one where the statute expressly authorizes it to be made for the benefit of an individual, as mentioned in section 62 of the Transportation Corporations Law. The Commission cannot require, even in a city or village, an extension of the pipes for more than 100 feet for individual use. It cannot have greater power in the country for the accommodation of a farm. The spirit of the Public Service Commissions Law is that the Commission stands between the company and the public, and it is only moved by an individual when he is asserting a public right for the benefit of himself and others. The Commission does not find that any other person can be benefited by its action; the whole proceeding is based upon the theory that the gas pipe is required solely for the petitioner's farm. The Commission had no authority to make such order, and the extension required is not a reasonable extension. The Appellate Division cannot put its judgment and discretion in the place of the judgment and discretion of the Commission; but it may determine whether the Commission has acted within its authority and whether its action was arbitrary. (*People ex rel. New York & Queens Gas Co. v. McCall*, 219 N. Y. 84.) The order should, therefore, be annulled, and the matter remitted to the Commission.

Lyon, J., concurred.

JAMES F. LEARY and THOMAS J. MORRISON, Respondents, v. CITY OF
WATERVLIET, Appellant.

Judgment and order affirmed, with costs, on the opinion of Rudd, J., at Trial Term (Reported in 97 Misc. Rep. 127). All concurred, except Kellogg, P. J., who dissented in memorandum.

KELLOGG, P. J. (dissenting): The proposal of the contractor, which is a part of the contract, provides that the plaintiff "has carefully examined and fully understands the contract, plans and specifications hereto attached, and has made a personal examination of the site of the proposed work and the character of material to be encountered." Section 34 of the specifications, also a part of the contract, provides: "The contractor shall take all responsibility of the work, shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what is assumed or was expected, or on account of the weather, floods or other causes," etc. These provisions, in my judgment, prevent a recovery.

App. Div.] Third Department, May, 1917.

CHARLES S. SANFORD, Respondent, v. WILLIAM BRADY and JOHN WELCH,
Appellants.

Negligence — motor vehicles — collision on highway — joint tort feasons — racing.

Appeal by the defendants, William Brady and John Welch, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Greene in favor of the plaintiff on the 24th day of November, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of November, 1916, denying the defendants' motions for a new trial made upon the minutes.

Judgment and order affirmed, with costs. All concurred, except Woodward, J., who dissented in part, with opinion, in which Sewell, J., concurred.

WOODWARD, J. (dissenting): At about ten o'clock in the evening of August 15, 1916, the defendants met at the Urlton Country Club, situate upon the State highway between Coxsackie and Greenville, in Greene county. The defendant Welch had a Mercer car and the defendant Brady a Hudson super-six. The Urlton Country Club appears to be a saloon and dance house, and while the defendants were there several drinks were taken, and the defendants danced with some young women, and it was proposed that they go in the cars to another saloon and dance house known as "Karnicks." There appears to have been some suggestion on the part of Welch that he would beat Brady to Karnicks, but it is difficult to conceive of the matter as anything more than banter. The defendants each entered their cars, with the friends who were present and invited, and started for Karnicks. When about half the distance had been traversed, and while rounding a sharp curve, Welch, whose car was in the lead, discovered the light of plaintiff's car coming from the opposite direction, and drew his car well over to the right-hand side of the roadway, and passed the plaintiff without accident, going on to the agreed destination. Brady, who was following and who apparently did not discover the plaintiff's approach, for some reason drove his car to the left-hand side of the highway at this curve and came into collision with the plaintiff, who was driving his car partly upon the macadam and partly upon the gravel at the side of the macadam, demolishing plaintiff's car and doing the plaintiff and others bodily injury. The action was brought against both defendants on the theory that they were engaged in racing, and that they thus became joint tort feasons, and the jury has found a verdict in favor of the plaintiff against both defendants. There seems to be no good reason why the verdict should not stand as against the defendant Brady, but we are of the opinion that there is no substantial ground for the verdict against Welch, who did not come into collision with the plaintiff, and who does not appear to have been in any manner responsible for the way in which Brady operated his car. How wholly untenable is the plaintiff's theory, in so far as it relates to the defendant Welch, is shown by the so-called statement of facts of the respondent. After describing the conditions surrounding the parties at the start, and after tracing them up

the incline to the point of the accident, he says: "When the two cars got half way up to the point of the accident, the cars were making a terrific noise and were within two car lengths of each other and were going about fifty miles per hour. When Welch's car approached the curve, just beyond where the accident occurred, Welch saw the light of the Sanford car as it approached and he pulled over on to the right side of the road. This was the first opportunity that Brady had to pass and he immediately plunged into the opening and when he came face to face with the Sanford car, he pulled off of the road to the left and attempted to run around the Sanford car. * * * When the Welch car passed the Sanford car, it was going at least sixty miles per hour. * * * The Brady car was following the Sanford [Welch] car within two car lengths and going at least fifty miles per hour." That is we are asked to believe that Brady, who was going at the rate of fifty miles per hour, was attempting to pass Welch, who was traveling at least sixty miles per hour, and that Welch was in some manner to blame for the accident which befell the plaintiff. The evidence shows that the cars were running up grade, one of them with its cut-out open; that the highway was full of sharp and dangerous curves, making it practically impossible to maintain the rate of speed which is claimed, and if the Welch car was running at sixty miles per hour it is absurd to talk of Brady plunging into the opening made by Welch throwing his car to the outside of the roadway in an effort to pass. Brady is not pretended to have been running over fifty miles per hour, and the assumption of counsel that the distance of two car lengths, alleged to have prevailed when the cars were half way to the point of the accident had been maintained, is wholly without support in the evidence. There is, likewise, no evidence to support the proposition that this was the first opportunity that Brady had had for passing, or that Brady in fact made any effort to plunge into this opening. The simple fact is that two automobile parties started out in the evening for a lark, and one of them collided with the plaintiff and did him injury, without any act on the part of the other which in any degree contributed to the accident, any more than would have been the case if Welch had simply happened along and run his car up the incline ahead of Brady without knowing that Brady was following him. It may be that Welch was operating his car negligently, though it affirmatively appears that he saw the Sanford car light and made adequate provision for passing him safely, but this has nothing to do with the plaintiff; the latter was not injured by anything that Welch did. It is not established that the defendants were racing; there was no agreement to race, nor is there any evidence to show that Brady was attempting to pass Welch. So far as the evidence goes there was a mere bantering suggestion on the part of Welch that he could beat Brady to Karnick's place, and an apparent acquiescence on the part of Brady that Welch could do this, but there is not the slightest evidence that either of the defendants was engaged in a speed contest. The cars were high-powered cars; the plaintiff's counsel insists that they were capable of doing seventy miles per hour, but the greatest speed claimed is for Welch, who is alleged to have passed the Sanford car at at least sixty miles per hour, while Brady was dragging along at

App. Div.]

Third Department, May, 1917.

fifty miles per hour in an alleged effort to plunge into an opening to pass the car going at sixty miles per hour, with a capacity of seventy. What might be the rule if the defendants were shown to have been racing in such a manner that each of them was involved in the accident is not here for determination. If they had been running abreast in such a manner that Brady could not avoid the collision without involving himself and Welch in an equally dangerous accident, and this had been in violation of some positive law or ordinance, as was the case in *Hanrahan v. Cochran* (12 App. Div. 91), the jury might have been warranted in holding the defendant Welch liable; but the evidence in this case does not show the defendant Welch to have made any improper use of the highway resulting in injury to the plaintiff. If he had hit the plaintiff's car it may be that the fact of his running in excess of thirty miles an hour might have been evidence of negligence, but it has no bearing where he has not produced an injury. The judgment and order appealed from should be reversed as against the defendant Welch and a new trial granted, with costs, and affirmed as to the defendant Brady, with costs.

Sewell, J., concurred.

ELIZABETH C. CLIFFORD, as Administratrix, etc., of JOHN J. CLIFFORD, Deceased, Respondent, v. JOSEPH A. MONGAN, Appellant.— Judgment and order unanimously affirmed, with costs.

JOSEPH DOBBINS, Respondent, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.— Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted.

JAMES E. FLYNN v. FRED R. BADGER.— Motion denied.

JOHN FASH and JOHN J. JOYCE, Appellants, v. PASQUALE BRUNO, Respondent.— Judgment and order unanimously affirmed, with costs.

FRANTZ MANUFACTURING COMPANY, Respondent, v. OLIVER H. PERRY, Appellant.— Interlocutory judgment unanimously affirmed, with costs, with usual leave to defendant to withdraw demurrer and answer on payment of costs in this court and in the court below.

CHARLES GABEL, Respondent, v. JEREMIAH PARTRIDGE and LOUIS CANFIELD, Appellants.— Judgment unanimously affirmed, with costs.

LAURA A. GILCHRIST, Plaintiff, v. SENECA R. STODDARD and Others, Appellants. LE ROY R. STODDARD and Others, Respondents.— Order unanimously affirmed, with ten dollars costs and disbursements.

JAMES Y. GATCOMB, Respondent, v. THE STATE OF NEW YORK, Appellant.— Judgment unanimously affirmed, with costs.

WALTER C. GREENE, Individually and as Sole Surviving Executor, etc., of ANGELICA VAN VRANKEN, Deceased, Appellant, v. GRACE FITZGERALD, and Others, Respondents.— Judgment unanimously affirmed, with separate costs to the defendants separately answering and filing briefs on this appeal, on the ground that the action involves only real estate and cannot, therefore, be maintained by the plaintiff for the reasons stated by Whitmyer, J., at Trial Term.

Third Department, May, 1917.

[Vol. 178]

MAURICE H. HARTIGAN and JOSEPH E. DWYER, Individually and as Copartners, etc., of HARTIGAN & DWYER, Respondents, v. CASUALTY COMPANY OF AMERICA, Appellant.— Judgment unanimously affirmed, with costs.

ORSON J. HUTCHINS, Appellant, v. FRANK W. HUTCHINS, Impleaded with WILLIAM M. STEPHENS, Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

INGALLS STONE COMPANY, Appellant, v. THE STATE OF NEW YORK, Respondent.— Judgment unanimously affirmed, with costs.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Respondent, v. F. H. OLTZ, Appellant.— Judgment unanimously affirmed, with costs.

LOTBINIERE LUMBER COMPANY, Respondent, v. UNITED PAPERBOARD COMPANY, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

In the Matter of the Application of WILLIAM J. REED, as a Creditor of HENRY M. BAILEY, Deceased, for Permission to Sell Real Estate to Pay Debts of Said HENRY M. BAILEY.— Order unanimously affirmed, with ten dollars costs and disbursements.

✓ In the Matter of the Claim of ROSANNA WOOD, for Compensation, v. TUPPER LAKE CHEMICAL COMPANY and THE TRAVELERS INSURANCE COMPANY, Appellants.— Award affirmed, on the authority of *Dale v. Hual Construction Co.* (175 App. Div. 284); *Matter of Dale v. Saunders Bros.* (218 N. Y. 59); *Hartell v. Simonson & Son Co.* (Id. 345). All concurred, except Woodward, J., who dissented.

In the Matter of the Claim of OSCAR CUMMINGS, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN JOHNSON CONSTRUCTION COMPANY, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

In the Matter of the Claim of MARY I. OWENS, Mother, and Another, Respondents, etc., for Compensation under the Workmen's Compensation Law, v. NEW YORK MILLS CORPORATION, Employer, and AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

In the Matter of the Claim of LOUIS STAUFFENBERG, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN P. MULLER & SON, Employer, and the CASUALTY COMPANY OF AMERICA, Insurance Carrier, Appellants.— Award unanimously affirmed.

In the Matter of the Claim of RICHARD MCKAY, Respondent, for Compensation under the Workmen's Compensation Law, v. E. G. HINCHMAN COMPANY, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

In the Matter of the Claim of MINNIE GREENBERG, Widow, etc., Respondent, for Compensation under the Workmen's Compensation Law, v. CANADIAN KNITTING MILLS, Employer, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

App. Div.]

Third Department, May, 1917.

In the Matter of the Application of HERMAN WINTERS, an Employee, Respondent, for Compensation under the Workmen's Compensation Law, v. L. MARCOTTE & COMPANY, Employer, and PRUDENTIAL CASUALTY COMPANY, Insurer, Appellants.—Award unanimously affirmed.

In the Matter of the Claim of ANNA GEOFFNER, Widow of PAUL GEOFFNER, and Others, for Compensation under the Workmen's Compensation Law, v. JOHN L. HENNING, Employer, and the UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

WILLIAM MANKES, Respondent, v. LOUIS FISHMAN, Appellant.—Judgment and order reversed on the ground that the verdict is excessive, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the recovery to seventy-five dollars, in which case the judgment is so modified and as modified judgment and order unanimously affirmed, with costs. All concurred, Cochrane, J., not sitting.

PASQUALE MARINO, Respondent, v. NICOLA GALLO, Appellant.—Judgment and order unanimously affirmed, with costs.

In the Matter of the Judicial Settlement of the Account of SANFORD J. HOSLEY and ALBERT S. HOSLEY, as Executors, etc.—Decree unanimously affirmed, with costs.

WILLIAM F. McCULLOUGH, an Infant, by ANNA McCULLOUGH, His Guardian ad Litem, Respondent, v. WILLIAM F. CAMPION, Appellant.—Judgment and order reversed, on the ground that the damages are excessive, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the recovery to \$1,600, in which case the judgment is so modified and as modified judgment and order affirmed, with costs. All concurred, except Kellogg, P. J., and Woodward, J., who voted for reversal.

In the Matter of the Claim of PATRICK REDDY, Respondent, for Compensation under the Workmen's Compensation Law, v. NATIONAL EXCAVATING AND FOUNDATION COMPANY, INC., Alleged Employer, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Insurance Carrier, Appellants.—Award unanimously affirmed.

ISABEL McDERMOTT, Respondent, v. ROBT. H. INGERSOLL & BRO., Appellant.—Award unanimously affirmed.

CHARLES E. McDONALD, as Administrator, etc., Respondent, v. THE STATE OF NEW YORK, Appellant.—Judgment unanimously affirmed, with costs.

WINIFRED McMULLEN, Respondent, v. MUNICIPAL GAS COMPANY OF THE CITY OF ALBANY, Appellant.—Judgment and order reversed, and new trial granted, with costs to appellant to abide event, on the ground that the damages are excessive, unless the plaintiff stipulates to reduce the damages to \$500, in which case the judgment is so modified and as modified judgment and order unanimously affirmed, without costs. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK STOCK-YARDS COMPANY, Relator, v. MARTIN SAXE and Others, Constituting the STATE TAX COMMISSION, and the STATE TAX COMMISSION, Respondents.—

Third Department, May, 1917.

[Vol. 173]

Determination unanimously confirmed, with fifty dollars costs and disbursements.

WALTER L. PRATT and Others, Respondents, v. THE CITY OF SCHENECTADY, Appellant.—Judgment affirmed, with costs. All concurred, except Kellogg, P. J., who favors a modification by striking out of the recovery \$853.90, allowed in the forty-third finding of fact, and \$1,452.54 allowed by the forty-sixth finding of fact.

NATIONAL BANK OF COMMERCE OF ROCHESTER, N. Y., Respondent, v. CITY OF WATERVLIET, Appellant, Impleaded with JAMES F. LEARY and Another, Defendants.—Judgment and order unanimously affirmed, with costs, on the opinion of Rudd, J., at Trial Term. (Reported in 97 Misc. Rep. 121.)

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN BENDER and Others, Respondents, v. LELAND G. DAVIS, Mayor, and Others, Aldermen, Constituting the Common Council of the City of Cortland, N. Y., and Another, Appellants.—Order unanimously affirmed, with costs, on the opinion of Sewell, J., in the court below. (Reported in 100 Misc. Rep. 334.) Sewell, J., not sitting.

WALTER H. PATTERSON, Appellant, v. NEW ENGLAND EQUITABLE INSURANCE COMPANY, Respondent, Impleaded with Another.—Judgment reversed, with costs, and judgment directed in favor of the plaintiff for \$181.50, with interest from March 4, 1916, and costs, on the opinion in *Bronnie v. New England Equitable Ins. Co.* (ante, p. 331), decided herewith. All concurred.

JOSEPH ROSENFELD, Respondent, v. HENRY W. SEIGEL, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event, upon the ground that it was prejudicial error to refuse to charge in substance that the rental value under the lease to be considered was \$250 per year. All concurred.

EDITH M. ROSE, Respondent, v. THE TOWN OF CONKLIN, Appellant.—Judgment and order unanimously affirmed, with costs, under the last sentence of section 1317 of the Code of Civil Procedure.

HARRY STOLINSKY v. GUSSIE STOLINSKY.—Motion to dismiss appeal denied, with leave to respondent to renew the same at a subsequent term if so advised.

B. F. STURTEVANT COMPANY, Appellant, v. ERIE RAILROAD COMPANY, Respondent.—Order unanimously affirmed, with ten dollars costs and disbursements. Sewell, J., not sitting.

FRANCES SWIDERSKI, as Administratrix, etc., Respondent, v. SCHENECTADY RAILWAY COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs.

FLORENCE STOCK, Respondent, v. WELBY UPDIKE, Appellant.—Judgment and order reversed, and new trial granted, with costs to appellant to abide event, on the ground that the verdict is against the weight of the evidence. All concurred, except Sewell, J., who dissented; Lyon, J., not sitting. The court disapproves of the finding that the defendant committed an assault.

App. Div.]

Third Department, May, 1917.

ETHEL L. TICKNOR, an Infant, by ALBERT TICKNOR, Her Guardian ad Litem, Respondent, v. GEORGE D. LANDERS, Appellant.— Judgment and order unanimously affirmed, with costs.

TOWN OF GLENVILLE, Respondent, v. THE STATE OF NEW YORK, Appellant.— Judgment unanimously affirmed, with costs.

GEORGE H. WHALEY, Respondent, v. MARY J. SOUTHERLAND, Appellant.— Judgment unanimously affirmed, with costs.

ELEANOR H. DAVIDSON, Appellant, v. LOUIS M. REAM, Respondent.— Order unanimously affirmed, without costs.

In the Matter of the Claim of EMIL PETERMANN, Respondent, for Compensation under the Workmen's Compensation Law, v. WM. STEINER SONS & Co. and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Appellants.— Motion for reargument granted.

In the Matter of the Claim of LOUIS YAMIN, Respondent, for Compensation under the Workmen's Compensation Law, v. HARRIS RAINCOAT COMPANY, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED, Insurance Carrier, Appellants.— Motion for reargument granted.

In the Matter of the Claim of WILLIAM A. AMESBURY, Respondent, for Compensation under the Workmen's Compensation Law, v. VACUUM OIL COMPANY, Employer and Self-Insurer, Appellant.— Award unanimously affirmed.

In the Matter of the Claim of WILLIAM SCHWEIGER, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN SCHREINER, Employer, and GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND, Insurance Carrier, Appellants.— Award unanimously affirmed.

JOSEPH McMAHON and THOMAS H. FARRINGTON, Appellants, v. THE VILLAGE OF WATERLOO, Respondent.— Order modified by changing the place of trial from the county of Broome to the county of Ontario. The provision in the order as to costs is modified by providing that the costs shall abide the event. As so modified, the order is unanimously affirmed, with ten dollars costs and disbursements to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. MORRIS BLOCK, Assessor, etc., Respondent, and the ULSTER AND DELAWARE RAILROAD COMPANY, Intervenor, Respondent.— Motion denied.

BIRD M. ROBINSON and Another, as Surviving Members of a Committee of Bondholders and Stockholders of BRUNSWICK AND BIRMINGHAM RAILROAD COMPANY, Appellants, v. COLUMBIA TRUST COMPANY, Respondent.— Motion denied.

CHARLES H. STARKE, Appellant, v. THE CATSKILL AND ALBANY STEAMBOAT COMPANY, LIMITED, and W. ALLISON BEAR, Respondents.— Motion for reargument granted.

CORNELIUS F. TIERNEY, Respondent, v. GEORGE W. PERKINS, as President of the CIGARMAKERS' INTERNATIONAL UNION OF AMERICA, Appellant.—

Third Department, May, 1917.

[Vol. 178]

Decision amended so as to read as follows:* Judgments and order reversed, with costs, and complaint dismissed, with costs. Opinion by Woodward, J. (See *ante*, p. 391.) All concurred, except Kellogg, P. J., who dissented in memorandum in which Lyon, J., concurred. The court disapproves of the finding that the plaintiff was a dependent relative of the deceased member who at the time of her death was dependent in whole or in part upon her.

FRANK S. CAPELLO, Respondent, v. ASA L. MERRICK, Appellant.— Motion denied.

J. JOHN HASSETT, Appellant, v. HARRIET ARNOT RATHBONE, Personally and as President of T. BRIGGS AND COMPANY, and T. BRIGGS AND COMPANY, Respondents.— Ordered that the order entered herein be and the same hereby is amended by striking out the words "and judgment is hereby directed in favor of the defendants dismissing the complaint herein upon the merits, with costs," and the judgment entered thereon in the clerk's office of Chemung county on the 19th day of March, 1917, is hereby vacated and set aside.

JOHN L. HENNING, as Trustee of GEORGE F. SHEVLIN, a Bankrupt, Respondent, v. MARY FOLEY, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

ISABEL McDERMOTT, Respondent, v. ROBT. H. INGERSOLL & BRO., Appellant.— Motion for leave to appeal to the Court of Appeals denied.

In the Matter of the Claim of JAMES A. HENDERSON, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN DONOVAN COMPANY, Employer, and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

In the Matter of the Petition of FRED CARP and WILLIAM S. OSTRANDER for a Writ of Certiorari to Review the Proceedings of the Board of Supervisors of Saratoga County with Respect to the Appointment of a Commissioner of Elections.— Sent to the Fourth Department. Lyon, J., not sitting. (See 179 App. Div. 387.)

In the Matter of the Claim of DELIA B. AMES for Compensation under the Workmen's Compensation Law, v. THE NEW YORK CENTRAL RAILROAD COMPANY.— Motion denied.

In the Matter of the Claim of ANNA GEOPFNER, etc., Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN L. HENNING, Employer, and the UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellants.— Motion denied.

In the Matter of the Claim of MARY I. OWENS, etc., Respondent, for Compensation under the Workmen's Compensation Law, v. NEW YORK MILLS CORPORATION and the AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Appellants.— Motion denied.

In the Matter of the Claim of JOSEPH E. KENNEDY, Respondent, for Compensation under the Workmen's Compensation Law, v. KENNEDY MANUFACTURING AND ENGINEERING COMPANY, Employer, and the UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Motion for reargument granted.

* A subsequent amendment appears on page 947.—[Rep.]

App. Div.]

Fourth Department, May, 1917.

In the Matter of the Claim of GEORGE J. VANCE, Respondent, for Compensation under the Workmen's Compensation Law, v. PETER A. FRAZEE AND COMPANY, INC., Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Decision amended so as to read as follows: The order heretofore made to send this case back to the Commission for further hearing is revoked, and the case set down for argument on July 2, 1917, at two P. M.

BRUCE NELLIS, Respondent, v. JAY COUNTRYMAN, Appellant.—Judgment unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, v. THE METROPOLITAN SURETY COMPANY. ROSA KAPPENBERG, as Assignee of JOHN H. H. KAPPENBERG, and ROSA KAPPENBERG, as Temporary Administratrix of the Estate of FREDERIKE HEINDORF, Deceased, Appellants, v. JOHN F. YAWGER, as Receiver of the METROPOLITAN SURETY COMPANY, Respondent.—Motion granted.

EDITH M. ROSE, Respondent, v. TOWN OF CONKLIN, Appellant.—Motion denied.

ELI SIMCOE, Respondent, v. ELLSWORTH GAMBLE, Appellant.—Motion granted. Appeals dismissed, without costs.

WILLIAM F. SNYDER, Respondent, v. EARL MACNY, Appellant.—Judgment and order unanimously affirmed, with costs.

WOOD AND BROOKS COMPANY, Respondent, v. J. E. DAVIS MANUFACTURING COMPANY, Appellant.—Judgment unanimously affirmed, with costs. Lyon, J., not sitting.

CORNELIUS F. TIERNEY, Respondent, v. GEORGE W. PERKINS, as President of the CIGARMAKERS' INTERNATIONAL UNION OF AMERICA, Appellant.—Decision amended so as to read as follows: Judgments and order reversed, on law and facts, and new trial granted in the City Court of Albany, with costs to abide the event. Opinion by Woodward, J. (See *ante*, pp. 391, 946.) All concurred, except Kellogg, P. J., who dissented in memorandum in which Lyon, J., concurred. The court disapproves of the finding that the plaintiff was a dependent relative of the deceased member who at the time of her death was dependent in whole or in part upon her.

FOURTH DEPARTMENT, MAY, 1917.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. PUTNAM GARDNER, Appellant.

Crime — attempt to rape — evidence.

Appeal from a judgment of conviction of the County Court of Jefferson county, rendered on the 8th day of November, 1916.

PER CURIAM: The defendant, an old man nearly eighty years of age, has been convicted of attempting to rape a girl of eight. The conviction rests upon the testimony of the child and a man whose reputation is not

the best, and is so inherently improbable and contrary to the surrounding circumstances and other credible testimony that we think the conviction should not be sustained. We are convinced after careful consideration of all the evidence that the verdict is against the weight of the evidence. All concurred. Judgment of conviction reversed and new trial granted, upon the ground that the verdict is against the weight of the evidence upon the question of the commission of the crime of which the defendant was convicted.

GEORGE J. CHRISTGAU, Respondent, *v.* STANDARD FIRE INSURANCE
COMPANY OF NEW JERSEY, Appellant.

Insurance — fire insurance — proofs of loss — evidence of value.

Appeal from a judgment of the Supreme Court, entered in the Erie county clerk's office on the 26th day of September, 1916, and also from an order entered on the 3d day of October, 1916.

Judgment and order affirmed, with costs. All concurred, except Foote, J., who dissented, and Merrell, J., who dissented in a memorandum.

MERRELL, J. (dissenting): I dissent upon the following grounds: (1) The verdict is excessive. (2) There was no timely service of proofs of loss as required by the contract of insurance, and plaintiff offered no sufficient evidence upon which defendant could be said to have waived the service thereof. (3) The trial court erroneously refused to admit in evidence the inventory and appraisal in the proceedings in bankruptcy of the Los Angeles Pure Fruit Company, in connection with plaintiff's cross-examination, and as bearing upon his evidence on value of the property destroyed. (4) That the trial court erroneously refused to charge the jury that, if the property destroyed was not salable, it had no market value.

ALVINA STAHLBERG, Appellant, *v.* THE PROTECTED HOME CIRCLE,
Respondent.

PER CURIAM: We are of the opinion that in view of the interest of the defendant's witnesses in exculpating themselves from fault, a fair question of fact was presented upon the evidence, as to whether the death of the deceased was accidental or suicidal. The evidence of the personal history of the deceased was very meager, and nothing to indicate a suicidal tendency upon his part. We are not convinced that the result would probably be different upon another trial. All concurred, except Foote and De Angelis, JJ., who dissented, and voted for affirmance. Order reversed, with costs, and verdict of the jury reinstated, with costs.

ROSA SALZANO, Respondent, *v.* MARINE INSURANCE COMPANY, LTD.,
Appellant.— Judgment and order affirmed, with costs. All concurred, except Lambert and Merrell, JJ., who dissented upon the grounds: 1. That the verdict is against the weight of the evidence. 2. That even if any insurance was effective, the car burned was not that covered by the policy.

App. Div.]

Fourth Department, May, 1917.

B. FRANK PERHAM, Individually and as Administrator, etc., Appellant, v. JENNIE W. COTTLE, Individually and as Executrix, etc., and Others, Respondents.— Order affirmed, with costs. All concurred.

JENNIE M. CLARK, as Administratrix, etc., Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

WILLIAM H. EDWARDS and Others, Respondents, v. THE PEOPLE OF THE STATE OF NEW YORK and Another, Appellants.— Judgment affirmed, with costs. All concurred.

ELIZABETH M. BAXTER, Respondent, v. HARRY M. DEKAY, Appellant.— Judgment affirmed, with costs. All concurred; Kruse, P. J., not sitting.

MACE MURGITTROYD, Appellant, v. TOWN OF LYSANDER and Another, Respondents.— Judgments affirmed, with costs. All concurred.

ROMAN B. WENZ, as Administrator, etc., Respondent, v. FRANCISCAN FATHERS OF THE CHURCH OF THE ASSUMPTION and Another, Impleaded with MARIE SCHULTZ, Appellant.— Judgment and order of County Court reversed, and judgment of Municipal Court affirmed, with costs in this court and the County Court. All concurred, except Foote and Merrell, JJ., who dissented upon the ground that the judgment of the Municipal Court was properly reversed as against the weight of the evidence. (See *post*, p. 955.)

RALPH R. MILLER, Respondent, v. ERIE RAILROAD COMPANY, Appellant.— Judgment and order reversed and complaint dismissed, with costs. Held, that the evidence did not justify a finding by the jury that the defendant wantonly, willfully or recklessly operated its train, resulting in plaintiff's injury. All concurred, except De Angelis, J., who dissented and voted for affirmance.

HERMAN HIGGS, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

BOLISTAW MIEDUSZEWSKI, an Infant, by MICHAEL WINISKI, His Guardian ad Litem, Respondent, v. THE DEXTER SULPHITE PULP AND PAPER COMPANY, Appellant.— Order affirmed, with costs. All concurred.

MICHAEL MARTIN, Respondent, v. SECURITY INSURANCE COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

CATHERINE SHIELDS, Appellant, v. GEORGE W. TUNNICLIFF and Others, Respondents.— Judgment and order affirmed, with costs. All concurred.

EVA BRAGAN, Respondent, v. SYRACUSE LIGHTING COMPANY, Appellant.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

LULU BLANSETT, and Another, as Administrators, etc., Respondents, v. CHARLES A. HINKLEY, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

CLYDE MASON, Respondent, v. JOHN JEPSON, Appellant.— Motion granted and appeal dismissed, with costs.

H. P. SICKELS COMPANY, Appellant, v. MCCURDY & NORWELL COMPANY, Respondent.— Motion granted and appeal dismissed, with costs.

VITTORIO DI FAZZIO, Appellant, v. HEWITT RUBBER COMPANY, Respondent.— Motion granted and appeal dismissed, with costs.

RUTH CHEW, as Administratrix, etc., Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellant.— Motion to dismiss appeal granted unless appellant shall file and serve briefs by May eighth, and be ready for argument on May fifteenth.

ALBERT E. SMITH, Respondent, v. FRANK J. NELSON, Appellant.— Motion to dismiss appeal granted unless appellant shall file and serve printed paper and briefs by May eighth, and be ready for argument on May fifteenth.

In the Matter of Proving the Alleged Last Will and Testament of ALICE FREELAND, Deceased.— Appeal dismissed, without costs, upon stipulation filed.

FRANK OSBORNE, Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.— Motion for leave to appeal to Court of Appeals granted.

ANGELINE M. SHEEHAN, Respondent, v. SAMUEL RAPPERPORT, Impleaded, etc., Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

ANNA M. STEEN, Respondent, v. EDWARD L. PARKER, Individually and as Trustee, etc., and Another, Impleaded with AMERICAN BONDING COMPANY OF BALTIMORE, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to the appealing defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal. Held, that in view of the allegations of the complaint that the bonding company refuses to cancel the bond without an accounting, and the absence of the precise contract between it and the trustee respecting the bond, it cannot be held that the complaint fails to state a cause of action. It would seem that at least an accounting by the trustee is proper. All concurred, except Foote, J., who dissented upon the ground that the demurrer should be sustained because the surety bond plaintiff seeks to have canceled is a valid and subsisting contract in the hands of the Eye, Ear and Throat Hospital of which it cannot be deprived without its consent. The accounting of the trustee is asked for only as a supposed necessary prerequisite to such cancellation.

ALVIN S. HALL, Individually and as Executor, etc., Respondent, v. JOHN J. ALLEN and Others, Appellants, and CARRIE MITCHELL and Another, Respondents.— Judgment affirmed, with costs. All concurred.

CHARLES B. GRAVES, Appellant, v. ADAM HERSPERGER, Respondent.— Judgment and order affirmed, with costs. All concurred.

KATE HESS, Respondent, v. RIBSTEIN-HOLTER COMPANY, INC., Appellant.— Order denying motion to vacate judgment affirmed, with ten dollars costs and disbursements. All concurred.

KATE HESS, Respondent, v. RIBSTEIN-HOLTER COMPANY, INC., Appellant.— Order denying motion for new trial affirmed, with costs. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JAMESTOWN ELECTRIC MILLS, INC., Appellant.— Judgment and order reversed, and

App. Div.]

Fourth Department, May, 1917.

new trial granted, with costs to appellant to abide event. Held, that the facts and circumstances offered to be shown, respecting the billing, storing and exposing for sale of the commodity, were improperly excluded. All concurred, except Merrell and De Angelis, JJ., who dissented.

EASTMAN MACHINE COMPANY, Respondent, v. JOSEPH ZUCK and Another, Appellants.— Order affirmed, with ten dollars and disbursements. All concurred.

In the Matter of the Estate of ANNA MASLOSKA, Deceased. **VALENTINE MACIOL, as Administrator, etc., Appellant; ALEXANDER DE NUBER, Consul-General of Austria-Hungary at the Port of New York, Respondent.**— Order affirmed, with ten dollars costs and disbursements. All concurred.

DANIEL F. STROBEL, Respondent, v. FIRMAN OUDERKIRK and Another, Appellants.— Motion to dismiss appeal denied, without costs. Order affirmed, with ten dollars costs and disbursements. Held, that as the appeal from the order was submitted at the same time the motion made by the defendants for relief from the effect of the receipt of the costs was heard, and we think the order should be affirmed, we deny the motion, without passing on the merits of the motion. All concurred.

CATHRINE A. GREENWOOD, as Sole Administratrix, etc., Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

TOMASO D'ASTOLI, Respondent, v. FRANCESCA COLLIA and Others, Appellants.— Judgment affirmed, with costs. All concurred.

CHARLES E. WILLETT, Appellant, v. JOHN W. BEARD, Respondent.— Order affirmed, with costs. All concurred.

NELLIE M. CAMPBELL, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order denying motion for new trial on the ground of newly-discovered evidence affirmed, with costs. Judgment and order denying motion for new trial upon the minutes affirmed, with costs. All concurred.

HENRY T. CAMPBELL, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order denying motion for new trial on the ground of newly-discovered evidence affirmed, with costs. Judgment and order denying motion for new trial upon the minutes affirmed, with costs. All concurred.

MARY J. ESSER, Respondent, v. THE HUNTER-TUPPEN COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

GUS G. BUSE, Appellant, v. NATIONAL BEN FRANKLIN INSURANCE COMPANY, Respondent. GUS G. BUSE, Appellant, v. NORTHWESTERN NATIONAL INSURANCE COMPANY, Respondent. GUS G. BUSE, Appellant, v. MILLERS NATIONAL INSURANCE COMPANY, Appellant.— Motion to amend order of affirmance in relation to costs denied.

WILLIAM J. WITTMAN, Respondent, v. DUROLITHIC COMPANY, Appellant, and JAMES G. DAVIS, Respondent.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

ABRAHAM F. DUBOIS, Respondent, v. MARY LEWIS, Appellant.— Motion to dismiss appeal granted, unless appellant shall file and serve printed

papers on appeal and printed briefs on or before May sixteenth and shall be ready for argument on May eighteenth.

JOHN PETRILLI, Respondent, v. ATLANTA CONSTRUCTION COMPANY, Appellant.— Motion granted, and appeal dismissed, with costs.

LILLIAN LANPHEAR, as Executrix, etc., Respondent, v. EDNA M. PARTRIDGE and Others, Appellants.— Motion granted, and appeal dismissed, with costs.

EARL J. GILLETTE, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Motion granted, and appeal dismissed.

JOHN P. PUGH, Appellant, v. PENNSYLVANIA RAILROAD COMPANY, Respondent.— Order denying motion for new trial upon the ground of newly-discovered evidence reversed, and motion for new trial granted, upon condition that plaintiff pay all costs accrued subsequent to notice of trial, within ten days after service upon plaintiff's attorney of a copy of this order, with due notice of entry thereof. Judgment vacated. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK ROSE, Appellant.— Judgment of conviction affirmed. Held, that the remarks touching the failure of the defendant to testify in his own behalf, attributed to the district attorney, although highly reprehensible, were not prejudicial to the defendant, in view of the clear evidence of the defendant's guilt, and the prompt instruction by the trial judge to the jury to disregard such remarks. All concurred.

WEBER-PEUTHERT COMPANY, Respondent, v. ABRAHAM N. LEVENTHAL, Appellant, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements. All concurred.

JOHN J. SMITH, Respondent, v. BROWN BROTHERS COMPANY, Appellant.— Judgment affirmed, with costs. All concurred.

C. AUGUST KOENIG and Another, Appellants, v. JOHN E. LAWLER, Respondent.— Judgment and order affirmed, with costs. All concurred.

PETER KURAK, Respondent, v. PETER TRAICHE, Appellant.— Judgment and order affirmed, with costs. All concurred, except Foote and Merrell, JJ., who dissented upon the ground that it was error to admit evidence of paralysis under the allegations of the complaint.

J. HARRY VAN ARSDALE, Respondent, v. ERIE RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

THOMAS RICHMOND, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

MATTHEW J. FOLTS, Respondent, v. ANNA CASLER CHESEBROUGH and Another, as Executrices, etc., Appellants.— Judgment affirmed, with costs. All concurred.

BLUMA FLAUM, Appellant, v. VITO PICARRETTO, Appellant, Impleaded with CHRISTOFORO TARRICONO and Others, Respondents.— Judgment, so far as appealed from by the plaintiff, affirmed, with costs. Judgment, so far as appealed from by the defendant Picarretto, modified so as to adjudge that the mechanic's lien of the said Picarretto is valid to the amount of

App. Div.]

Fourth Department, May, 1917.

\$375, and interest thereon from February 3, 1916, and prior to that filed by the defendants Wooster & Mott, and as so modified the judgment is affirmed, with costs to the appellant Picarretto against the respondents Wooster & Mott. Order to be settled before Mr. Justice Foote on two days' notice, at which time findings to be disapproved and proposed new findings to be made, if any, may be submitted. All concurred.

MAGDALINE ROSINSKY, Appellant, v. JOHN WENTKA, Respondent.— Judgment and order affirmed, with costs. All concurred.

VALERIA KOWALSKI, an Infant, by JOSEPH KOWALSKI, Her Guardian ad Litem, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and Another, Appellants.— Judgment and order reversed, with costs, and complaint dismissed, with costs. Held, that the plaintiff failed to establish actionable negligence. All concurred.

BERTHA TARAN, Respondent, v. RETZITZER REALTY COMPANY, Appellant.— Judgment affirmed, with costs. All concurred.

ROSE TARAN, Respondent, v. RETZITZER REALTY COMPANY, Appellant.— Judgment affirmed, with costs. All concurred.

RAE TARAN, Respondent, v. RETZITZER REALTY COMPANY, Appellant.— Judgment affirmed, with costs. All concurred.

E. A. STROUT FARM AGENCY, Respondent, v. JOHN P. OLSEN, Appellant.— Judgment affirmed, with costs. All concurred.

MARY E. DEMUN, Respondent, v. WILLIAM HIRSH, Appellant.— Judgment and order affirmed, with costs. All concurred.

EARL C. GILLETTE, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order dismissing appeal vacated and order entered dismissing the appeal unless appellant is ready to argue appeal at the opening of next term of court.

JULIA B. HALL, Appellant, v. ARTHUR B. DAVIS and Another, as Executors, etc., Respondents.— Appeal dismissed, without costs, upon stipulation filed.

In the Matter of the Judicial Settlement of the Accounts of BENJAMIN F. PETHERAM, as Substituted Trustee, etc., of FANNY JEWETT, Deceased, Respondent. MINNIE B. JEWETT and Others, Appellants; EDWARD T. JEWETT, Respondent.— Decree affirmed, with costs. All concurred.

DANIEL W. LYNCH and Another, Respondents, v. ORIENT INSURANCE COMPANY, Appellant, Impleaded with ROSE W. P. NESTER.— Judgment and orders affirmed, with costs. All concurred, except Foote, J., not voting.

In the Matter of the Application of JAMES O. SEBRING and WARREN J. CHENEY, Appellants, for an Order Determining and Enforcing Their Lien upon Certain Funds in the Hands of WILLIAM G. MASTERMAN, as County Treasurer of Steuben County, etc. GRACE L. QUINN and Others, Respondents.— Order affirmed, with costs. All concurred, except Merrell, J., who dissented.

VINCENTY DAMPKOWSKI, Appellant, v. MOSIER & SUMMERS, Respondent.— Judgment reversed and new trial granted, with costs to appellant to abide event. Held, that a case was made out for the jury. 1. The evidence is sufficient to support a finding that defendant was negligent in

the method of doing the work in not shoring up or taking some means to reasonably safeguard the plaintiff while working in the trench. 2. As to whether the alleged instructions of the foreman to the plaintiff and the weather conditions were such as to show that plaintiff disobeyed such instructions by continuing to work on account of the rain, was also for the jury. All concurred, except Foote and Lambert, JJ., who dissented.

MARCUS A. GREGORY, Appellant, v. THOMAS J. LENNON, Respondent.—Judgment affirmed, with costs. Held, that the proof of the action of the grand jury was not alone sufficient to make out a *prima facie* case of malice or want of probable cause. (See *Burhans v. Sanford*, 19 Wend. 417; *Brounstein v. Saklein*, 65 Hun, 365.) All concurred.

In the Matter of Proceedings to Assess a Transfer Tax on the Estate of ELLEN L. BUNCE, Deceased. THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; JULIUS PATRICK, as Executor, etc., Respondent. Order affirmed, with costs, upon the opinion of Atwell, Surrogate. (Reported in 100 Misc. Rep. 385.) All concurred.

JOHN DIRIMILIO, Plaintiff, v. THE EMPIRE ENGINEERING CORPORATION, Defendant.—Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs. All concurred.

RICHARD RIDLEY, Appellant, v. NATIONAL CASKET COMPANY, Respondent.—Judgment and order affirmed, with costs. All concurred.

ARTHUR VOELKER, Respondent, v. BUFFALO STEAM PUMP COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred.

CLARENCE RIEGER, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred.

MAUD TRAPP, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred, except Foote and Merrell, JJ., who dissented upon the ground that it was error to receive evidence of injuries not alleged in the complaint.

AGNES TEPAS, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.—Order denying motion for new trial upon ground of newly-discovered evidence reversed, and motion granted, upon the ground that it appears from the moving papers that the plaintiff made false statements with reference to her earnings. Judgment vacated. The costs of this appeal are awarded to the appellant to abide the event. All concurred.

FLORENCE MOORE, Respondent, v. CHARLES R. PULLEN, Appellant.—Judgment and order affirmed, with costs. All concurred.

MARY A. GREEN, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.—Judgment and order affirmed, with costs. All concurred.

HENRY WALTER, Respondent, v. GEORGE KNICKERBOCKER, Appellant.—Judgment and order affirmed, with costs. All concurred.

WILLIAM GLOSS, Appellant, v. TEOFIL MEGER and Others, Respondents.—Judgment modified by striking therefrom the affirmative recovery of the rentals collected by the plaintiff, and as so modified affirmed, without costs of this appeal to either party. All concurred.

App. Div.]

Fourth Department, May, 1917.

RUTH CHEW, as Administratrix, etc., Respondent, v. **THE NEW YORK CENTRAL RAILROAD COMPANY**, Appellant.— Judgment and order reversed and new trial granted, with costs to the appellant to abide the event, upon the ground that the verdict is excessive, unless the plaintiff shall, within ten days, stipulate to reduce the verdict to the sum of \$5,000 as of the date of the rendition thereof, in which event the judgment is modified accordingly, and as so modified is, together with the order, affirmed, without costs of this appeal to either party. All concurred, except Kruse, P. J., who dissented, and voted for affirmance.

GEORGE CHERTOFF, an Infant, by **LOUIS CHERTOFF**, His Guardian ad Litem, Respondent, v. **WILLIAM J. CONNERS**, Appellant.— Judgment and order affirmed, with costs. All concurred.

In the Matter of the Judicial Settlement of the Accounts of **WILLARD E. CONNOR**, as Administrator, etc., of **HARRY C. CONNOR**, Deceased, Respondent. **NELLIE CONNOR**, Appellant.— Decree modified so as to direct distribution of the fund equally between the father and mother of the decedent as his only next of kin, and as so modified affirmed, with costs to the appellant. Held that under the provisions of sections 1903 and 1905 of the Code of Civil Procedure, the recovery should be distributed equally between the father and mother of decedent as his only next of kin. All concurred.

ALBERT POINTON, Plaintiff, v. **GENERAL RAILWAY SIGNAL COMPANY**, Defendant.— Motion granted overruling plaintiff's exceptions and denying motion for new trial, with costs, and judgment directed for defendant upon the nonsuit, with costs, upon plaintiff's default in this court, without prejudice to a subsequent motion by plaintiff to open his default.

MARTHA HOSMER, as Administratrix, etc., Respondent, v. **HENRY CARNEY**, Appellant.— Motion granted unless appellant shall file and serve printed briefs by May twenty-fourth.

JULIA L. EDSON, Respondent, v. **INTERNATIONAL RAILWAY COMPANY**, Appellant.— Motion granted unless appellant shall file and serve printed briefs by May twenty-fourth.

ELMER F. EDSON, Respondent, v. **INTERNATIONAL RAILWAY COMPANY**, Appellant.— Motion granted unless appellant shall file and serve printed briefs by May twenty-fourth.

CHARLES NAUD, Appellant, v. **KING SEWING MACHINE COMPANY**, Respondent.— Motion for leave to appeal to Court of Appeals granted, and questions for review certified.

CATHERINE A. DALY, Plaintiff, v. **DAKE REALTY COMPANY and Others**, Defendants.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

ROMAN B. WENZ, as Administrator, etc., Respondent, v. **FRANCISCAN FATHERS OF THE CHURCH OF THE ASSUMPTION**, Defendant. **MARIE SCHULTZ**, Appellant.— Motion granted and decision amended so as to award costs against the plaintiff only. (See ante, p. 949.)

INEZ R. HARTLEY, Respondent, v. **JAMES MYRON RINGER**, Appellant.— Motion to vacate orders of dismissal granted, upon condition that the appellant file and serve the printed papers on appeal within five days,

pay the ten dollars imposed by order entered March 6, 1917, pay term fee for May term, and also pay ten dollars upon this motion.

THOMAS G. WALKER and Another, Respondents, v. ELLA A. PIXLEY, Appellant.— Judgment and order reversed and new trial granted in the County Court, with costs to the appellant to abide the event. Held, that in view of the holding and charge of the court that the claim for which the defendant is sought to be held liable was one for which she was not originally liable, it was error to permit the jury to find her liable upon the theory of an account stated. The naked promise to pay her husband's debt did not make her liable in the absence of any consideration therefor. (See *Callahan v. O'Rourke*, 17 App. Div. 277; *Bauer v. Amsb.*, 144 id. 274; *Brauer v. Lawrence*, 165 id. 8.) All concurred.

MICHAEL GROSSER, Respondent, v. NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Appellant.— Judgment and order reversed and new trial granted, with costs to the appellant to abide the event, upon the ground that the verdict is excessive, unless the plaintiff shall, within ten days, stipulate to reduce the verdict to the sum of \$5,000 as of the date of the rendition thereof, in which event the judgment is modified accordingly, and as so modified is, together with the order, affirmed, without costs of this appeal to either party. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BURT L. GIDDINGS and Others, Appellants.— Judgment and order affirmed, with costs. All concurred.

MARION E. BENSON, Respondent, v. NEW YORK STATE RAILWAYS, Appellant.— Judgment and order affirmed, with costs. All concurred.

PATRICK O'HORA, Appellant, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements, upon the authority of *Waisikoski v. Philadelphia & Reading Coal & Iron Co.* (173 App. Div. 538). All concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent, v. GEORGE DOUGLASS and Others, as Assessors of the Town of Batavia, Appellants.— Order reversed, with ten dollars costs and disbursements and motion denied, with ten dollars costs. All concurred.

EDWARD B. HARVEY and Another, as Executors and Trustees, etc., Appellants, v. ALICE G. HICKMAN, Respondent.— Order affirmed, with ten dollars costs and disbursements, with leave to the plaintiffs to withdraw their demurrer within twenty days upon payment of the costs of the motion and of this appeal. All concurred.

HENRY DAHLER, an Infant, by PAULINE DAHLER, His Guardian ad Litem, Plaintiff, v. PENNSYLVANIA RAILROAD COMPANY, Defendant.— Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs. All concurred.

VINNIE F. BUELL, Respondent, v. LOUIS K. LIGGETT COMPANY and Others, Appellants.— Judgment and order affirmed, with costs. All concurred.

App. Div.]

Fourth Department, May, 1917.

LEO GALSCHINSKI, an Infant, by FRANK GALSCHINSKI, His Guardian ad Litem, Appellant, v. THE POSTAL TELEGRAPH-CABLE COMPANY, Respondent.— Order affirmed, with costs. All concurred.

ANNA J. HEDDEN, Respondent, v. CLAUDE E. HEDDEN, Appellant.— Judgment, so far as appealed from, reversed, but without costs, upon the authority of *Davis v. Davis* (75 N. Y. 221) and *Kamman v. Kamman*, No. 1 (167 App. Div. 423). All concurred.

IMO TOMS LANGDON, Respondent, v. TOWN OF NEWFANE, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

JESSIE BLANKENSHIP, Respondent, v. JESSE O'DONNELL, Appellant.— Motion granted, amending the order of dismissal entered March 7, 1917, so as to provide that the appeal be dismissed, with costs, upon payment by respondent to appellant's attorneys of ten dollars as a condition of granting the amendment.

EMMA JOHNSON, Respondent, v. CITY OF BUFFALO, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

MARY A. BERGEN, Respondent, v. MORTON AMUSEMENT COMPANY, INC., Appellant, Impleaded with Others.— Motion for reargument denied, without costs. Motion for leave to appeal to Court of Appeals granted.

EASTMAN MACHINE COMPANY, Respondent, v. JOSEPH ZUCK and Another, Appellants.— Motion for reargument denied, with ten dollars costs.

JOHN P. PUGH, Appellant, v. PENNSYLVANIA RAILROAD COMPANY, Respondent.— Motion for reargument denied, with ten dollars costs, Motion to amend order of reversal granted, and order amended so as to state that no costs are allowed to either party upon the appeal to this court.

The following persons have been admitted during the May term, 1917, to practice as attorneys and counselors at law:

Upon certificate of State Board of Law Examiners: LLOYD J. MULLEN, of Batavia; HARRY A. SESSIONS, of Palmyra; GEORGE ALLEN DAVIS, JR., of Buffalo; JOSEPH P. COYLE, of Wellsville; MAY C. SICKMON, of Buffalo; GEORGE B. WESLEY, of Buffalo; GLENN H. ADAMS, of Buffalo; J. CARL HAGAMAN, of Buffalo; MAURICE F. CANTOR, of Buffalo; THOMAS F. HINDS, of Buffalo; REUBEN G. KINKEL, of Buffalo; JOHN T. WALSH, of Buffalo; JOSEPH H. CORCORAN, of Rochester; GEORGE A. KING, of Buffalo; JOHN D. STUMBO, of Livonia; JOSEPH S. KAZUBOWSKI, of Buffalo; HALTON D. BLY, of Rochester; SIDNEY K. BACKUS, of Rochester; EVERETT C. CASE, of Chili Station; ALBERT W. ROBBINS, of Rochester; JAMES R. MARTIN, of Honeoye Falls; LAMBERT C. HICKEY, of Lockport; RAYMOND G. HEIM, of Lancaster.

Upon credentials from State of Pennsylvania: PHILLIP WILLETT.

Upon credentials from State of Utah: FRANK S. SCHOONOVER.

INDEX.

ACCOUNTING.

Appeal from decree on accounting.

See DECEDENT'S ESTATE, 1.

Representative action to compel directors to account — examination of defendants before trial.

See DEPOSITION.

Partnership at will — dissolution.

See PARTNERSHIP.

Proof of oral contract of agency.

See PRINCIPAL AND AGENT, 4.

AGENCY.

See PRINCIPAL AND AGENT.

ALIENATION OF AFFECTION.

Scienter of defendant essential.

See HUSBAND AND WIFE, 1.

ANNULMENT.

Validity of decree annulling marriage where court had no jurisdiction.

See HUSBAND AND WIFE, 3.

Temporary alimony and counsel fee.

See HUSBAND AND WIFE, 7.

APPEAL.

Trial — when dismissal of complaint should not be made upon merits.
An appeal does not lie from a decision of the court, but only from the judgment which carries it into effect.

But on appeal from an "order" which dismisses the complaint for failure of proof at trial the court may treat the appeal as one taken from a judgment.

Where a complaint was dismissed at the end of the plaintiff's case it was error for the court to make findings of fact upon issues as to which the defendants had the burden of proof and which were not tried.

The judgment should be one of nonsuit where the defendants moved to dismiss the plaintiff's case without announcing that they rested, and no findings of fact or determination on the merits should have been made.
Wittmann Bros. v. Forman Bottling Co., 674.

Practice on appeal from order of surrogate settling accounts.

See DECEDENT'S ESTATE, 1.

Judgment must be sustained on theory in court below.

See INSURANCE, 4.

Order denying motion to strike out denial in answer as frivolous.

See PLEADING, 4.

When question sought to be raised not insisted upon on trial.

See PRINCIPAL AND AGENT, 1.

When Appellate Division can interfere with findings of State Industrial Commission.

See WORKMEN'S COMPENSATION LAW, 10.

ASSIGNMENT.

When assignee of beneficiary in will entitled to proceeds of lands taken by eminent domain — will — power of sale construed — when condemnation of lands equivalent to sale by testamentary trustees. Submission of a controversy upon an agreed statement of facts pursuant to the Code of Civil Procedure. The plaintiff, a creditor of a beneficiary under a will and as assignee of her interest in moneys which were the proceeds of lands of the estate taken by eminent domain and held by the executors, claims to be entitled to the

ASSIGNMENT — Continued.

share of the assignor and asks that the executors be required to pay over the same. The defendant executors contend that, under the terms of the will, the plaintiff's assignor could only become entitled to the proceeds of the land in case they were voluntarily sold by the trustees under a discretionary power given by the will, and that the taking of the lands by eminent domain was not such sale as vested the assignor with any interest in the proceeds.

Held, that the taking of the lands by eminent domain was in fact a sale within the meaning of the will which, as construed by the court, entitled the assignor to share in the proceeds without restriction and that the only discretion conferred upon the executors related to the price and terms of sale.

When the proceeds of the lands taken by eminent domain were received by the testamentary trustees in cash they became personal property and subject to distribution under the terms of the will. *Tiffany Studios v. Seibert*, 787.

Assignment of claim for breach of contract of employment — judgment in prior action by assignee.

See MASTER AND SERVANT, 5.

ATTORNEY AND CLIENT.

1. *Admission of non-resident attorney on motion revoked.* Admission to the bar of this State of a Pennsylvania attorney, on motion revoked upon the ground that he had not been admitted to practice in the Supreme Court of Pennsylvania, which is the highest court of law in that State, and for fraudulent statement in his affidavit that he had practiced continuously in the courts of Pennsylvania since his admission, and for failure to state that he had been indicted in said State. *Matter of Carpel*, 146.

2. *Gross unprofessional conduct — making false affidavit — refusing to pay over money due to receiver and converting same — making false statement of fact to receiver — violation of written stipulation.* Attorney at law disbarred for gross professional misconduct which consisted, *first*, in making a false affidavit with intent to deceive the court; *second*, by improper collection of rents due to a receiver, by refusing and neglecting to pay the same over on demand and by converting a large part thereof to his own use; *third*, in making a false statement in his letter to the receiver that the court had made him a certain allowance; and *fourth*, for violating a written stipulation not to take an appeal.

The possessory lien of an attorney at law assumed the *res* to be in his possession. The existence of such lien does not entitle the lienor to use the property subject thereto, and if an attorney uses money in his possession, on which he claims a lien, he is guilty of a conversion.

A stipulation not to take an appeal is binding. *Matter of Brown*, 558.

3. *Attorney at law disbarred.* Attorney at law disbarred in that, after his election as director of a fraternal benefit association, he aided and abetted a conspiracy to loot the treasury of the association by appropriating securities, etc. *Matter of Hoyt*, 570.

4. *Attorney at law censured — conversion of money belonging to client.* Attorney at law censured for converting to his own use money collected for his client, and also money paid to him by the client for deposit in court. *Matter of Pollock*, 577.

5. *Attorney at law suspended for conversion of moneys delivered to him for use in paying referee's fees — circumstances not excusing misconduct — intent to repay, no excuse.* Attorney at law suspended from practice for converting to his own use moneys paid to him to be deposited with a referee in payment of the latter's fees and disbursements, so as to secure the delivery of the referee's report.

Failure to so apply such money is not excused by the fact that a doubt existed in the mind of the attorney and his associate as to the soundness of the referee's conclusions, and by the fact that pending disciplinary proceedings had disrupted his business and left him in a highly agitated state of mind.

Under no circumstances is an attorney warranted in using his client's money as his own, and an intent to repay is no excuse for such misconduct. *Matter of Coleman*, 580.

ATTORNEY AND CLIENT — *Continued.*

6. *Attorney at law — evidence not sustaining charge of conversion — attorney at law censured for false statements before grievance committee — purpose of disciplinary proceedings.* Charges against attorney of having converted his client's money to his own use held, not to have been sustained, it appearing that such money received in settlement of a claim for the client had been delivered to another for payment to the client.

Attorney at law severely censured for endeavoring to conceal from the grievance committee payments to the complaining witness for the purpose of buying him off and securing the withdrawal of charges, and for making false statements upon the hearing denying such acts.

Disciplinary proceedings are instituted not for the purpose of adjusting differences between attorney and client, or for forcing a settlement or bringing about the collection of moneys claimed to be due, but are solely for the purpose of maintaining the dignity and honor of the profession. The purpose is to exercise the great and summary power of the court, not for the benefit of a complaining individual, but for the good of the community. *Matter of Branch*, 585.

7. *Attorney at law disbarred — aiding judgment debtor to conceal property.* Attorney at law disbarred for participating in an attempt of his client, a judgment debtor, to conceal from the creditor on an examination in supplementary proceedings property belonging to the judgment debtor by taking and keeping it in his possession during the examination, by allowing his client to testify falsely without objection or protest and by claiming privilege when interrogated under oath concerning the transaction. *Matter of Abuza*, 757.

8. *Attorney at law disbarred — permitting client to verify petition containing false statements.* Attorney at law disbarred for permitting his client, the plaintiff in an action for divorce, to verify a petition containing a material false statement to the effect that she had established a *bona fide* residence in the State of New Jersey and in procuring the same to be filed in the office of the clerk of the court in said State. *Matter of Mathol*, 759.

Disbarment. *Matter of Kuntz*, 911.

Professional services — bill of particulars. *Wolfe v. Miller*, 887.

Attorney's lien on proceeds of judgment — extent.

See **LIEN**, 2.

Authority under power of attorney to guarantee payment of notes.

See **PRINCIPAL AND AGENT**, 2.

BANKING.

Suit by State Superintendent to enforce statutory liability of stockholders — evidence furnishing prima facie proof of insolvency and excess of liabilities — claims filed by former Superintendent of Banks — records of public officers as evidence — powers and duties of State Superintendent — when State not estopped from enforcing liability of stockholder because transferees are brought in as additional defendants — failure of stockholder to compel indemnity by transferee — record holder and actual owner equally liable — stockholder of former bank not participating in or knowing of merger not liable — liability where transfer not recorded — escape from liability by attempt to effect transfer. Action by the Superintendent of Banks of the State of New York to enforce the statutory liability of stockholders of an insolvent bank, one of the defendant stockholders contending that the plaintiff failed to produce competent proof to support a finding that the bank was insolvent at the time the action was brought, or that its liabilities exceeded its assets — the par value of its capital stock — by a certain amount. Evidence examined, and held, sufficient to establish *prima facie* the insolvency of the bank and the excess of liabilities over assets.

The inventory of assets and list of claims filed by a former State Superintendent of Banks under section 19 of the former Banking Law was, by virtue of section 922 of the Code of Civil Procedure, making a record filed by a public officer presumptive evidence of facts therein contained, properly admitted in evidence and was sufficient to establish a *prima facie* case of insolvency.

BANKING — Continued.

As section 19 of the former Banking Law required the Superintendent of Banks to file lists of claims "including and specifying such claims as have been rejected by him," it placed upon him the duty of ascertaining which were valid and which were invalid claims, and his act of returning claims not rejected is equivalent to an express allowance thereof.

Especially is the validity of such claims established where dividends have been declared thereon by order of the court, made on application of the State Superintendent.

A defendant stockholder cannot escape liability because the plaintiff brought in as additional defendants persons to whom bank stock had been transferred, upon the contention that he was misled by the allegations of the supplemental complaint and thus failed to seek affirmative relief against brokers who had purchased his stock at auction for a certain customer, said stock being in the hands of the State Superintendent, irrespective of whether or no the supplemental complaint identified the stock sold to others. The plaintiff was at liberty not only to bring in the defendant as a record holder, but also the transferees, for both are liable.

Moreover, the State Superintendent was at liberty to proceed against the record holder only.

But holders of the stock of a former bank which, through merger unauthorized by and unknown to them, was incorporated into the bank now insolvent, are not liable for the statutory liability. Nor can they be held liable because after the merger the new bank carried them on its books as stockholders, for they could not be made such without their consent, express or implied, or by a waiver of the invalidity of the merger as to them.

A person who appeared as a stockholder on the books of the bank at the time it was taken over by the State Superintendent should have been charged with the liability, although the stock had been put in his name by his employer, a trust company which held it as collateral security, even though the stock had been transferred to other parties, if no attempt was made to register the transfer.

But where a record stockholder had sold his shares, and on making inquiry was informed by a director of the bank that the transfer had been recorded, he did all that could reasonably be required of him to effect the transfer, and he is relieved from liability as a stockholder. *Richards v. Robin*, 535.

Liability of bank for payment of forged draft.

See **BILLS AND NOTES**, 2.

Duty of bank to inquire as to authority of treasurer to draw corporate checks to his own order.

See **CORPORATION**, 3.

BANKRUPTCY.

1. *Fraudulent transfers — authority of liquidating trustees to whom assets have been transferred under composition agreement to set aside fraudulent transfer under section 19 of Personal Property Law — effect of confirmation of composition agreement.* A liquidating trustee to whom the assets of a bankrupt are transferred pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and may, under the authority of section 19 of the Personal Property Law, maintain an action to set aside a fraudulent transfer by the alleged bankrupt notwithstanding the provisions of section 14 of the Bankruptcy Act of 1898 providing that upon the execution of a composition agreement the bankrupt shall become discharged from all his provable debts.

A trustee may, under section 19 of the Personal Property Law, maintain an action without the recovery of a judgment against the insolvent debtor.

The effect of the confirmation of a composition agreement under which the assets of a bankrupt are transferred to a trustee is to substitute for the claims of the creditors against their debtors a right to share in the consideration agreed to be transferred. *Kobre Assets Corporation v. Baker*, 62.

2. *Pleading — action by trustee against corporation, its officers and transferees to set aside transfers — complaint stating cause of action — when no misjoinder of parties defendant.* The complaint of a trustee in bankruptcy in an action brought against a corporation, its officers and other defendants to whom assets were transferred, states a cause of action against all of the defendants where it in substance alleges that said officers of the corporation

BANKRUPTCY — Continued.

paid certain moneys of the corporation to the other defendants without consideration other than the discharge of antecedent unsecured debts so that their claims were paid in full and that to the knowledge of the defendant officers the corporation was at that time insolvent and that said payments were made in violation of section 66 of the Stock Corporation Law of the State of New York and will effect a preference to creditors unless they are set aside and that such payments were made and received with the intent of effecting such preference when the insolvency of the corporation was imminent.

Such complaint need not allege that the corporation had defaulted on its notes or other obligations within the contemplation of section 66 of the Stock Corporation Law.

The appointment of the plaintiff as trustee in bankruptcy of the corporation dispensed with reducing the claims of creditors to judgments.

Said complaint states but a single cause of action in equity and there is no misjoinder of parties defendant although they are not equally liable and they are not all concerned in the same illegal transfers of the property of the bankrupt. *Sherwood v. Holbrook*, 462.

Title of trustee in bankruptcy of vendee under contract of conditional sale — provability and release of claim for conversion.

See *SALE*, 5.

BILLS AND NOTES.

1. *Action on non-negotiable promissory note — defense — conditional delivery of note — conflicting testimony as to application of interest paid — erroneous direction of verdict — evidence.* Where the defendant, sued on a non-negotiable promissory note, sets up as a defense that the sole consideration for the note was certain certificates of deposit delivered to him by the father of the payees named in the note to secure the payment of moneys which a partnership, of which the father of the payees was a member, owed to the defendant, and the proof raises a question of fact as to whether certain interest paid by the defendant was paid on account of the certificates of deposit received by him or was paid upon the note, it was error for the court to decide, as a matter of law, that the payment of the interest made the note effective and to direct a verdict for the plaintiff, it being for the jury to say upon which of the two obligations the interest was paid.

Under the circumstances it was competent for the defendant to show that the note never had a valid inception; that the delivery thereof to the father of the payees was conditional, and that the condition was that the note was not to take effect or be delivered to the payees until the payment of said indebtedness to the defendant. *Rubel v. Honig*, 53.

2. *Liability of savings bank for paying forged draft — what does not constitute payment — liability of commercial bank for payment on forged signature.* Where the president of a membership corporation presented its pass book and a draft, on which he had forged the signatures of its trustees, to a savings bank, the by-laws of which provide that drafts on deposits might be made by an order in writing, and that payments might be made "in specie, bills or by check," and after the exercise of reasonable care in determining the genuineness of the signatures on the draft a check was delivered to the president of said corporation drawn to its order, on which he forged the signatures of the trustees and drew the money, which he converted to his own use, neither the delivery of the check nor the subsequent payment thereof on the forged indorsements constituted payment, and the defendant savings bank is liable to the plaintiff.

Although a commercial bank is liable as matter of law for payment on a forged signature, a savings bank is bound only to exercise reasonable care in determining the genuineness of the signatures on a draft drawn on a deposit. *Szwento Juozepo Let Draugystes v. Manh. Sav. Inst.*, 57.

3. *Action on note of business corporation executed by treasurer without authority — production of note not prima facie evidence of authority — burden of proof — evidence — execution of similar notes by treasurer — payment of notes by corporation — proof that corporation received proceeds of note.* In an action upon the promissory note of a manufacturing corporation executed by its treasurer, the production of the note by the plaintiff claiming to be

BILLS AND NOTES — *Continued.*

a holder in due course does not establish a *prima facie* case and cast upon a defendant corporation the burden of showing its treasurer's want of authority.

The treasurer of such corporation has no implied power by virtue of his office to make promissory notes in its name, and the burden is upon a plaintiff to show, either that said treasurer in fact did have authority expressly conferred by the by-laws or directors, or to be implied from prior course of dealing, or that the corporation is estopped from denying such authority.

Where the by-laws of such corporation forbade the treasurer to issue notes except upon the approval of the board of directors or its executive committee, and no such approval to the note in suit was formally given, and no executive committee was ever appointed, and it appears that the payee of the note owned all the stock of the corporation and entirely directed its affairs, it was error to exclude evidence that other notes had been signed by the treasurer under like circumstances and had been paid by the corporation, for if such were the fact the note became a binding obligation.

It seems, that if the rights of other creditors should intervene, the burden would be upon the defendant to show that fact in order to escape liability on the note.

Moreover, it was error to reject evidence to the effect that the corporation had received the benefit of the proceeds of the note, for if it were so, it could not assert any lack of authority in its treasurer to execute the same. *Hubbard v. Syenite-Trap Rock Co.*, 531.

Authority under power of attorney to guarantee payment of notes.

See PRINCIPAL AND AGENT, 2.

BUFFALO, CITY OF.

Protection of excavations — ordinances construed.

See NEGLIGENCE, 9.

CARRIER.

Action against express company for loss of goods.

See PLEADING, 2.

Distinction between liability of wharfinger for merchandise and wharfe rents wharfage privilege.

See SHIPS AND SHIPBUILDING.

See COMMON CARRIER.

CERTIORARI.

Municipal corporations — city of New York — review of determination of police commissioner dismissing relator from police department — effect of prior determination and statements by police commissioner. Where, on certiorari to review the proceedings of the police commissioner of the city of New York in dismissing the relator from the police department, it appears that said commissioner, prior to the hearing, possessed information establishing the falsity of the relator's answers which was not accessible to the latter, and had also told him that if he made "any untruthful statement" in answer to inquiries as to whether he had given certain orders to his men he would "break" him, the determination should be annulled and the proceeding remitted for a new trial. *People ex rel. Tappin v. Cropsey*, 180.

Alleged forged deed — when alleged grantee and purchaser on foreclosure not mortgagee in possession so as to bar ejectment.

See EJECTMENT.

Review of assessment of railroad company — right of other company to intervene.

See TAX, 1.

CHARITY.

Liability of orphan asylum for negligence in choice of servant.

See NEGLIGENCE, 11.

CITY.

See MUNICIPAL CORPORATION.

CODE OF CIVIL PROCEDURE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lkv.]

CODE OF CRIMINAL PROCEDURE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxvi.]

COMMERCIAL PAPER

See **BILLS AND NOTES.**

COMMON CARRIER.

1. *Conversion — diversion by defendant of carloads of grain on bills of lading for which plaintiffs had made advances — knowledge by plaintiffs as to diversion of merchandise represented by earlier bills of lading.* Where in an action for damages resulting from the diversion by the defendant of certain carloads of grain, the bills of lading for which plaintiffs held and had made advances upon, it appears that the bills of lading actually represent grain received by defendant and in its possession when plaintiffs made the advances, it will be held that the plaintiffs acquired a special property in the grain, and that when defendant permitted it to be diverted into other hands it committed a conversion of plaintiffs' property which it could justify only by showing actual consent or acquiescence on the part of the plaintiffs.

Evidence examined, and held, insufficient to establish such consent or acquiescence.

The fact that plaintiffs had knowledge that merchandise represented by other and earlier bills of lading upon which they had made advances had been diverted without their consent, is insufficient as a defense, although it should have aroused the plaintiffs' suspicions.

Action for damages caused plaintiffs by reason of having made advances upon bills of lading issued by defendant which did not represent and never had represented any actual merchandise. *Held*, that the complaint was properly dismissed on the ground that when plaintiffs made the advances they had reason to believe that the statements made in earlier bills of the same description were untrue, and hence their advances were not made in good faith and in reliance upon the bills of lading. *Knight v. Delaware & Hudson Co.*, 518.

2. *Liability for loss of goods — bill of lading construed — agreement limiting liability of carrier — Interstate Commerce Law construed.* Where a bill of lading covering the entire shipment of merchandise from Japan to the State of New York, and thus including transit across the continent by the defendant railroad, expressly provided that the goods are valued by the shipper at not exceeding \$100 per package and that "the liability of the Companies therefor" in case of loss shall not exceed \$100 per package, the shipper cannot recover in excess of that sum where the goods were destroyed while being transported by the defendant in this country, even though it is admitted that the real value of the goods was greatly in excess of that stated.

As the agreement was a "through bill of lading" its terms as to value were intended to apply to any of the successive carriers, including the defendant.

Although an interstate shipment, whether originating in this country or abroad, is controlled so far as concerns that portion of the transportation which is interstate, by the Interstate Commerce Law, and the rules, form of contract and classification established in pursuance of that law, nevertheless said law and the schedules filed thereunder do not forbid a limitation of the carrier's liability such as is contained in the bill of lading aforesaid. In fact the third section of the uniform bill of lading allows a lower valuation of goods to be agreed upon. *Burke v. Union Pacific Railroad Co.*, 783.

3. *Interstate commerce — action by shipper to recover demurrage charges — jurisdiction of State court prior to investigation of Interstate Commerce Commission — voluntary payment without protest no defense.* A State court has jurisdiction of an action to recover demurrage charges which plaintiffs, the receivers of interstate carload freight from defendant, a common carrier, had paid to defendant upon its demands for holding cars in its yard prior to placing them upon plaintiffs' private track, in which action the reasonable-

COMMON CARRIER — Continued.

ness of the defendant's rule as to freight tariffs is not assailed, but in which recovery is sought upon the theory that the defendant failed to comply with said rule in that its agent did not give the plaintiffs the written notice required thereby, although there has been no investigation and determination by the Interstate Commerce Commission as to the validity of the charges.

Said charges may be recovered although payments were made voluntarily and without protest. *Wilson v. Long Island Railroad Co.*, 799.

CONDEMNATION.

See EMINENT DOMAIN.

CONDITIONAL SALE.

Failure to file contract.

See SALE, 5.

CONFLICT OF LAWS.

Workmen's Compensation Law of New Jersey — action here.

See MASTER AND SERVANT, 3.

CONSERVATION LAW.

Violation of section 185 — action to recover penalty for refusal to exhibit hunting license — pleading — complaint — failure to allege exception in statute. A complaint, in an action to recover a penalty for a violation by the defendant of section 185 of the Conservation Law, in refusing to exhibit his hunting license, is insufficient, where it does not allege that the defendant was not one of the persons excepted by the statute from the duty of procuring a license.

As the statute limits the requirement for a license to persons who are not the owners or lessees of farm land and in possession of the same, if the defendant was in fact the owner or lessee of farm land on which he was hunting and in possession of the same, he was not bound to have the license at all and could not be subject to the penalty prescribed. *People v. Bradford*, 371.

Collection of moneys expended in fighting fires.

See MANDAMUS.

CONSOLIDATED LAWS.

[For table containing all sections cited in this volume, see *ante*, p. lix.]

CONSPIRACY.

Wrongfully injuring business of another by boycotts.

See INJUNCTION, 2.

Procuring discharge of subordinate by false reports.

See MUNICIPAL CORPORATION.

CONSTITUTIONAL LAW.

Validity of stipulation and judgment disposing of lands in forest preserve in violation of Constitution, article 7, section 7 — effect of vacating said judgment on right of parties to litigate question of title — right of defendant to withdraw as party. Where, in an action in ejectment by the State to recover possession of certain wild forest lands, a stipulation is entered into between the parties settling the litigation, by which it is agreed that the defendant shall take judgment dismissing the complaint and adjudging them to be the owners of a certain portion of the land, and shall convey to the people certain tracts, a judgment entered in accordance with said stipulation is void and may be set aside because it attempts to dispose of lands belonging to the forest preserve, in violation of the State Constitution, article 7, section 7.

The vacating and setting aside of said judgment is not a bar to the right of the defendants to litigate the question of title.

One of the defendants who had complied with the stipulation was entitled prior to the vacating of the judgment, to withdraw as a party defendant. *People v. Withersbee*, 368.

Parties entitled to raise constitutional question.

See MANDAMUS.

CONSTITUTIONAL LAW — Continued.

Right of trial in own county.

See PRACTICE, 3.

Taxability of property held by entirety upon the death of one party.

See TAX, 2, 4.

Sale of land by one person to satisfy debt of another.

See TAX, 5.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, p. lviii.]

CONTEMPT.

Refusal to obey subpoena — practice.

See NEW YORK CITY, 3.

CONTRACT.

1. *Agreement relating to manufacture and exhibit of moving picture films construed — action on bond of surety company insuring due performance by exhibitor — defenses — violation of contract by plaintiff by selling same film to other exhibitor — offset — moneys received from other exhibitor.* The plaintiff agreed to manufacture and deliver to the defendant a moving picture film which the defendant was to have the sole right to exhibit in the United States and Canada and on the delivery of the film the defendant was to advance to the plaintiff the actual cost of manufacture, not to exceed \$14,000. The defendant also agreed to pay to the plaintiff fifty per cent of its gross receipts from the exhibition of the film, but the plaintiff was not to be entitled to said percentage until the defendant had first reimbursed itself out of the receipts for the manufacturing cost advanced to the plaintiff on delivery of the film, so that the original cost of manufacture was ultimately to be borne solely by the plaintiff out of its share of the receipts of the defendant. To secure performance the defendant gave a bond of the defendant surety company, upon which this action is based, which recited and referred to the aforesaid agreement and provided that nothing therein contained shall modify the right of the defendant to repayment of the advances made to the plaintiff out of the moneys realized by the defendant on said production. The answer of the defendants alleged that acceptance of the film was refused because the plaintiff had delivered to another exhibitor substantially the same film under an agreement by which the plaintiff was to receive from the other exhibitor a percentage of its receipts from the production of the picture in the United States and Canada and that it had actually received certain sums of money from said exhibitor.

Held, that the obligation of the defendant surety company to pay arose, not only when there was an acceptance of the film manufactured by the plaintiff, but also when the plaintiff in other respects did what it was required to do under the contract, and that hence the special defenses aforesaid are good and the plaintiff is not entitled to recover the full amount of \$14,000, as the moneys received from the other exhibitor should be offset against the claim. *Goldberg v. Popular Pictures Corporation*, 86.

2. *Agreement to furnish plans for exhibition booth — acceptance conditioned upon approval of plans by exhibition authorities — evidence — disapproval of plans and allotment of space on other plans.* Where defendants intended to exhibit at the Panama exhibition if they could procure from the authorities in charge thereof an allotment of space, which could only be had after the approval of a proposed plan of their exhibit, and the plaintiff offered to prepare plans for such exhibit, which offer was accepted by the defendants in a letter stating that "should we be the successful applicant, and the space referred to be awarded to us, we will gladly contract with you to furnish the material and erect the booth per plans and bid submitted," the agreement to accept the plaintiff's plans was conditioned upon the defendants being awarded the space at the exhibition after an approval of the plans by the exhibition authorities.

Hence, in an action to recover the contract price for the plans it is error for the court to exclude evidence offered to show that the allotment of space to the defendants was refused upon the plaintiff's plans and was allotted upon plans made by other persons.

CONTRACT — Continued.

The defendants' letter was not merely an offer to enter into a contract upon certain conditions, but on the contrary was an acceptance of the plaintiff's offer upon terms, and the mere fact that the parties contemplated reducing the agreement to more formal terms is not important.

Nor is such contract void for lack of essential details regarding the materials to be used in the construction of the exhibit where it appears that it was understood between the parties that certain customary materials were to be used. *Singer v. Diaston & Sons, Inc.*, 108.

3. *Agreement by member of partnership doing a brokerage business to repurchase bonds bought by customer — implied authority — evidence — presumption — burden of proof.* The question as to whether a member of a partnership engaged in banking and dealing with investment securities has implied authority to guarantee to a purchaser of bonds the principal and interest and to bind his firm to repurchase the bonds at the end of a specified time if the purchaser so desires, depends upon the facts in each particular case, there being no general rule.

Where the plaintiff purchased bonds relying upon such guaranty and promise made by a member of a partnership without actual authority, and having proved a written guaranty, relies upon the presumption that the partner executing the same had implied authority owing to the nature of the partnership business, and it appears that the bonds sold belonged to the partnership and matured in eight years, there is a presumption of implied authority, and the burden is upon the defendants, sued for a breach of the guaranty to repurchase, to give evidence as to whether the guaranty was within the ordinary manner of carrying on the firm's business. Hence, where the defendants offered no testimony on this question, it was proper for the court, in a trial without a jury, to render judgment for the plaintiff. *First National Bank v. Farson*, 135.

4. *Agreement by treasurer of corporation in which his father's estate was interested to take up loan against said corporation and give notes therefor — Statute of Frauds — consideration.* The treasurer of a corporation in which his father's estate was largely interested as a creditor and otherwise, and which was indebted to the plaintiff for moneys loaned, for the enforcement of the payment of which the plaintiff had taken active steps, replied to a letter written to his mother, the executrix of the estate, as follows: "I have taken it upon myself to settle the question * * * I have decided to take up this loan myself on behalf of the estate in shape of five notes," which he agreed to pay with interest. The plaintiff in an action to recover the amounts which would become due on said notes if they had been delivered as proposed, alleged that he discontinued the collection of his claim and canceled and surrendered the same with interest and accepted the offer of the defendant to take the notes, which the defendant refused to deliver.

Held, that the contract constituted an original agreement, unprejudiced by the Statute of Frauds, given for a sufficient consideration and enforceable. *Froude v. Fleischmann*, 257.

5. *Evidence sustaining defendant's right to cancel contract notwithstanding express provision thereof to contrary — negligence — failure of party to read paper before signing — fraud.* In an action upon an advertising contract which provided that "this contract cannot be cancelled" and that "all promises and agreements are stated herein; verbal agreements with salesmen not authorized," the defendant claimed that when the contract was made with the plaintiff's agent he informed him that he contemplated going out of business, and that it was then agreed between them that if he did so he should be at liberty to cancel the contract, and that the agent promised to insert such provision. Evidence examined, and held, sufficient to establish the defendant's contention.

The negligence of a party in failing to read a paper which he signs does not necessarily preclude him from asserting its invalidity on the ground of fraud. *Outcault Advertising Co. v. Stratton*, 353.

6. *Agreement to clean and waterproof stone surface of State Capitol building construed — liability to contractor for delay due to examination and acceptance of method of waterproofing, and also for temporary suspensions ordered because of noise interrupting hearings being held in building.* A contractor with the State agreed to furnish the material and labor necessary for cleaning,

CONTRACT — *Continued.*

pointing and waterproofing the stone work of a portion of the exterior of the State Capitol building. The contract provided that the work should be commenced promptly and prosecuted with diligence, and that the contractor should be liable in specified liquidated damages for each day of delay beyond the date named for completion, and that "no charges shall be made by the contractor for any delays or hindrances from any cause during the progress of any portion of the work embraced in his contract;" but that should a delay be caused by any act of the State authorities, the contractor would be allowed an extension of time. The contract also provided that the stone surfaces should "be treated by a method to be proposed by the contractor that will waterproof and preserve the stone, without changing the appearance of the building, for a period of five years, and which the contractor shall guarantee by a surety company bond in the amount to be stated in his proposal."

Held, that the reasonable and necessary delays by the State in fixing upon the method of waterproofing to be used were within the contemplation of the contract, and hence the State should not be held liable on account thereof if defendant granted the contractor a corresponding extension of time in which to complete its contract;

But delay resulting from the holding of the impeachment trial necessitating temporary suspensions of the work because of the noise from the sand blasts was not within the contemplation of the parties, and hence the State is liable for damages resulting therefrom. *Waples Co. v. State of New York*, 357.

7. *Agreement to reduce rates for electric current if reductions are made to other consumers — reductions made to consumer in lieu of payment of rent — contract construed — when plaintiff not entitled to recover alleged overpayment — limitation of action.* Action to recover overpayments alleged to have been made by the plaintiff for electric current furnished by the defendant during a period of nine years. The contract provided that in the event of any reduction in the prices of the defendant made to another consumer using current under like conditions as the plaintiff, corresponding reductions should be made in the terms of the contract with the plaintiff. On the trial it was shown that the defendant, occupying a portion of premises owned by another consumer for use as a substation for the manufacture of its electricity, made a contract with such consumer to furnish current at rates lower than those charged the plaintiff for current consumed up to the value of \$10,000, and that for current consumed in excess of said sum the sum of \$3,500 was charged against the rent for the use of the aforesaid station, and thereafter any current used in excess of \$13,500 was to be paid for by said customer at the regular wholesale rate charged to the plaintiff and others.

Held, that the reduction in rates to the other customer was in fact made in payment of the rental value of the premises occupied by it for a substation, and hence the plaintiff had failed to establish a cause of action upon its contract.

By the contract with the other consumer was intended to effect a payment of rent, although a clause in the contract stated that the defendant was to use the consumer's premises "free and without charge," for said phrase was loosely used and not intended to contradict the prior provisions of the contract.

The plaintiff's action, although based upon a fraudulent concealment and misrepresentation by the defendant, being merely an action to recover a money judgment for overpayments, the Statute of Limitations began to run when the payments were made and the right to recover them accrued, and not from the date of the discovery of the fraud. Hence, upon a new trial no payments can be recovered which were made more than six years prior to the commencement of the action. *Saks & Co. v. New York Edison Co.*, 634.

8. *Building contract construed — substantial performance — mechanic's lien — foreclosure.* A building contractor undertook to perform work to conform to architect's plans and specifications and also to abide by the architect's decision in the event of any error or difficulty in the specifications. The architect was discharged and the owner undertook to complete the agreement substituting himself as his own architect. At a meeting of the

CONTRACT — Continued.

parties to test a heating plant the contractor made a substantial offer for the substitution of a larger boiler with a further sum for other matters in issue and the owner after stating that he would take the proposition under consideration failed to answer the offer and subsequently notified the general contractor that he considered the contract as abandoned and would himself complete the same.

In an action to foreclose a mechanic's lien, *held*, that in the circumstances there was a substantial performance; that the percentage rule has no application, and that the lienor was properly decreed what was equitably due him. *Tibbits v. Cohen*, 680.

9. *Agreement authorizing defendant to sell under its own name product manufactured by plaintiff — suit to enjoin defendant from manufacturing and selling similar product after termination of agreement — right of defendant to use its own trade name — pleading — complaint not stating cause of action — injunction.* Action to enforce by injunction a negative covenant in writing. The complaint in substance alleged that the plaintiff, who manufactured an ink eradicator, gave to the defendant exclusive right to sell the same under the defendant's trade name, while the defendant on its part agreed not to handle any other ink eradicator during the period the agreement was in force, the same to be terminated by either party by giving six months' notice in writing. By a subsequent agreement the defendant further agreed that it would not manufacture, cause to be manufactured, or sell any ink eradicator in imitation of that manufactured by the plaintiff, or put up in similar packages labelled with similar labels, so long as the plaintiff furnished its eradicator to the defendant at a stated price. There was no time set for the continuance of this second agreement. It was further alleged that the defendant, having terminated the agreement by written notice, was manufacturing and selling an ink eradicator of its own make and under its trade name. The only respect, however, in which it is claimed that the packages used by the defendant resembled those formerly used for the plaintiff's eradicator under the contract was the similarity in the name of the product, for the defendant continued to brand its new product with its own trade name.

Held, that the complaint failed to state a cause of action and should be dismissed, and that an order granting a temporary injunction should be reversed. This, because the defendant, not having otherwise contracted, had a right to use its own name in its business and that no unfair imitation of the plaintiff's package was shown.

As the second agreement between the parties was not limited as to the time of its duration it was terminable at the will of either party upon giving a reasonable notice to the other. *Bailey v. Stafford, Inc.*, 811.

10. *Accord and satisfaction — acceptance of goods sold — deduction of offset and payment by check for balance.* Where the buyer of goods retained the same he became indebted for the purchase price and did not establish an accord and satisfaction as to a lower price by deducting the amount of an alleged offset because the goods were not up to the agreed quality and by sending a check for the balance to the seller who retained the same.

No accord and satisfaction was established by the transaction aforesaid although the buyer when sending the check wrote that he sent it in full payment. *Frank v. Vogt*, 833.

11. *Option to cancel contract of sale under certain contingencies construed — effect of embargo by foreign countries on exportation of product.* A clause in a contract by a chemical company for the sale of carbolic acid, stating that "Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option," does not relieve said company from liability on the ground that foreign countries from which it obtained its supply of carbolic acid have placed an embargo on its exportation since the outbreak of the war, especially where the purchaser offers to accept domestic carbolic acid.

The reasonable construction of the contract is to be found by applying to it the rule *ejusdem generis*, and the words "fire, strike, accidents to our works or to our stock, or change in tariff" must be held to limit and qualify the "contingencies beyond our control" and to confine the happen-

CONTRACT — Continued.

ings which would justify the cancellation of the contract to those of a like nature to the ones enumerated, which do not include an embargo. *Davids Co. v. Hoffmann-La Roche Chemical Works*, 855.

Action for breach.

Spearin v. City of New York, 898.

Agreement to purchase interest in lands with money advanced — failure to establish agreement.

See **CONVERSION**.

Agreement by husband to pay wife certain sum executed prior to divorce — satisfactory performance.

See **HUSBAND AND WIFE**, 5.

Breach of contract of employment — assignment — judgment in prior action as bar.

See **MASTER AND SERVANT**, 5.

Release for personal injuries — failure of consideration.

See **MASTER AND SERVANT**, 7.

Promise to pay debt of another — consideration.

See **MORTGAGE**, 2.

Agreement by owner of mortgage that third person shall have secondary interest therein — when no trust relationship created.

See **MORTGAGE**, 3.

Abrogation of municipal contract — financial condition of contractor.

See **NEW YORK CITY**, 3.

Acceptance of salary — accord and satisfaction as to balance claimed to have been due.

See **NEW YORK CITY**, 5.

Improper counterclaim for conversion of note.

See **PLEADING**, 3.

Division of commissions between real estate brokers.

See **PRINCIPAL AND AGENT**, 6.

Covenant in deed to erect building — when covenant does not run with land.

See **REAL PROPERTY**, 3.

Optional agreement to pay usury.

See **USURY**.

Conveyance of land — effect of municipal ordinance regulating use enacted between date of contract and consummation.

See **VENDOR AND PURCHASER**.

See **SALE**.

CONVERSION.

Alleged agreement to purchase interest in lands with moneys advanced by plaintiff — evidence not establishing cause of action. Action to recover moneys which the plaintiff alleged were advanced by her to be used by the defendant for the purpose of purchasing for the plaintiff a one-half interest in certain lands which were to be resold by the defendant and the profits from the sale equally divided between the parties, which moneys the plaintiff alleges were converted by the defendant to his own use. The defendant asserts that he received the money of the plaintiff under an agreement to give her one-half of any profits he might make by a personal purchase and sale of the property, after first repaying the plaintiff's advancement out of the proceeds of the sale. Evidence examined, and *held*, insufficient to establish a case of conversion and that a judgment for the plaintiff should be reversed and her complaint dismissed. *Amsterdam v. Apfel*, 71.

Diversion by railroad of goods.

See **COMMON CARRIER**, 1.

Liability of railroad for loss of goods — limiting liability.

See **COMMON CARRIER**, 2.

CONVERSION—*Continued.*

Promissory note — counterclaim in action on contract.

See PLEADING, 3.

Intent that payment and delivery be concurrent — agreement to resell.

See SALE, 2.

See ATTORNEY AND CLIENT, 2, 4-6.

CORPORATIONS.

1. *Pleading* — sufficiency of complaint in action to compel directors to declare dividends fraudulently withheld from plaintiff in violation of express contract — authority of directors to determine amount of dividends — fraud — fiduciary relation of directors to stockholders — constructive fraud by directors — control of power and discretion of directors by agreement between themselves — Supreme Court — jurisdiction. A complaint which alleges that the plaintiff's intestate and the two individual defendants had executed a written contract reciting that they owned all the capital stock of the defendant company in equal shares; that it was then worth a certain amount; that upon the death of any party to the agreement within five years his stock should become the absolute property of the other parties, the certificate to be retained by the personal representative of the deceased as security; that the survivor should pay therefor the amount stated in specified installments, and that pending payment "all dividends that may be declared by the corporation and earned by virtue of the ownership of the certificate of stock," etc., should be divided between the personal representative of the deceased and the survivors, in the proportion "that their respective interests in the certificate in question bear to each other," and which further alleges that after the death of plaintiff's intestate defendants paid to plaintiff the first installment; that although since the time of the death of the plaintiff's intestate the net earnings of the corporation have been very large, the defendants have refused to declare dividends in accordance with a scheme to withhold the earnings of the company until plaintiff's stock shall be paid for and so defraud the plaintiff, states a cause of action.

The authority of directors to determine what dividends shall be declared does not confer on them the power to commit a fraud.

Directors hold a fiduciary relation to the stockholders.

It is constructive fraud for directors to use their power for their own benefit.

The exercise of the power and discretion of directors owning all the capital stock of a corporation may be controlled by valid agreement between themselves, where the interests of creditors are not affected.

The Supreme Court has jurisdiction to compel the defendants, as directors, to declare dividends in order to prevent them from abusing their power to the injury of the plaintiff.

Such an action may be maintained on the analogy of a suit for specific performance of the express contract between them. *Kassel v. Empire Tinware Co.*, 176.

2. *Right of directors and officers to compensation* — excessive salaries — right of directors to declare dividends as salaries — judgment creditor's action against directors — consideration for issuance of stock — disbursements not in violation of Stock Corporation Law, section 66, where corporation solvent — extent of liability of directors for impairment of capital stock in violation of Stock Corporation Law, section 28. It is not unlawful for the sole stockholders of a corporation, who are also its directors, to take from its earnings a reasonable amount for their services, aside from their failure to pay in and retain unimpaired the capital stock.

Even when excessive salaries have been voted to themselves by said directors, but in good faith and without intent to defraud creditors, they may be allowed to retain such part thereof as will reasonably compensate them for their services for the performance of which others might have been employed.

In an action by a judgment creditor of a corporation who had sold property of the corporation on which he held a chattel mortgage, the interest on which had not been paid, resulting in a deficiency judgment, brought under sections 90 and 91 of the General Corporation Law to compel the officers and directors to account to a receiver to be appointed on the theory that disbursements of money made by the defendants to

CORPORATIONS — *Continued.*

themselves, as salaries, which for that reason were voidable at the instance of the corporation, may be avoided by its creditors on the ground that the capital of the corporation was thereby impaired in violation of section 28 of the Stock Corporation Law, a judgment cannot be sustained under section 55 of the Stock Corporation Law, although the stock was issued without consideration, because a violation of said section was not alleged and the complaint was not so amended, and for the further reason that the liability of each of the defendants on that theory would be limited by section 56 of the Stock Corporation Law to the capital stock received by him.

The issuance of capital stock in consideration of services to be performed in the future is unauthorized by section 55 of the Stock Corporation Law.

A judgment in such an action cannot be sustained under section 66 of the Stock Corporation Law on the theory that all disbursements subsequent to default in paying interest on the plaintiff's mortgage after demand were in violation of the provisions of said section, where the company was not financially embarrassed when it made default.

Under chapter 354 of the Laws of 1901, amending what is now section 28 of the Stock Corporation Law, the liability of directors on the ground that the capital of the corporation has been impaired is confined to the loss sustained by the corporation or its creditors by the wrongful declaration and payment of dividends. *Shaw v. Ansaldo Co., Inc.*, 589.

3. *When indorsees of check drawn by treasurer of corporation payable to his own order is put on inquiry as to treasurer's authority — liability of corporation on check drawn by treasurer payable to his own order — duty of bank having deposit of corporation to inquire as to the authorization of treasurer to draw checks — negligence of corporation in failing to audit canceled checks.* Where the treasurer of a corporation, by a resolution of its board of directors was "empowered to execute contracts or other obligations, sign or endorse checks, notes or drafts, and otherwise perform the usual duties pertaining to the office of treasurer," and a copy of said resolution was on file with the bank where the corporation had its account, and on May fifth of the same year the treasurer applied at the office of a steamship company for a passage ticket on one of its steamships to sail August thirteenth, for a party of several persons, and made a deposit, and on June fifteenth delivered to the steamship company in payment of the balance for the ticket a check of the corporation for \$500 drawn upon its bank by himself as treasurer, payable to his own order and indorsed by him to the order of the steamship company, and said company did not make any inquiry of the corporation as to the business and purpose for which said check was used by its treasurer, further than to make a prompt presentation thereof to the bank upon which it was drawn, and no demand for the return of the money represented by said check was made upon the steamship company until May 16, 1916, said company was put on inquiry as to the treasurer's authority to negotiate the check in payment of his personal indebtedness, not because it was payable to his own order, but because the circumstances clearly indicated that the transaction was for his personal benefit and because said company participated in the diversion by using the check in its own business and for its profit.

But since the corporation permitted its canceled checks to be returned to the treasurer who drew them, and since if they had been properly audited the diversion would have been discovered in time to enable the company to cancel the ticket, the corporation, its negligence having enabled the dishonest treasurer to perpetrate the fraud, must stand the loss.

A bank is not bound to inquire for the authorization of the treasurer of a corporation to draw the corporation's check to his own order when there is on file with it a resolution of the board of directors of such corporation giving the treasurer the usual general authority to draw and indorse checks.

Where there are any circumstances indicating that a check is being used or is intended to be used for the officer's personal benefit, or where the bank in any way participates in the diversion to its own benefit, the duty of inquiry exists, but the rule should not be unreasonably extended so as to clog business, especially since corporations may easily protect themselves by strictly limiting the authority given to draw and indorse their checks.

Thornton v. Netherlands-American Steam Nav. Co., 604.

CORPORATIONS — Continued.

4. *Inspection of stock book of foreign corporation — officers not liable for statutory penalty when stock book is not within State.* The officers of a foreign stock corporation, not a moneyed or railroad corporation, but having an office in this State, are not liable to the penalty prescribed by section 33 of the Stock Corporation Law for a failure to permit a stockholder to inspect the stock book of the corporation, if it appears that the stock book was not within the State at the time the demand for an inspection was made, or at any time, except for a brief period on the reorganization of the company. *Kellner v. Shelley*, 657.

Bank — transfer of stock — when record holder and actual owner equally liable for statutory liability.

See BANKING.

Action on note executed by treasurer without authority.

See BILLS AND NOTES, 3.

Action by non-resident against foreign corporation — discretionary power of court to decline jurisdiction.

See COURT.

Service of summons on managing agent of foreign corporation.

See PROCESS.

Application by gas company for leave to sell bonds.

See PUBLIC SERVICE COMMISSION.

Apportionment of special dividends between life beneficiary and remaindermen.

See TRUST, 2.

Transferring stock to trustees for benefit of corporation — trust period not measured by lives — unlawful suspension of power of alienation.

See TRUST, 4.

COUNTY.

When term of sheriff chosen at special election begins to run.

See PUBLIC OFFICER, 1.

COURT.

Jurisdiction — action by non-resident against foreign corporation — Code Civil Procedure, section 1780, construed — discretionary power of court to decline jurisdiction — pleading — demurrer — answer alleging that defendant will induce court to decline jurisdiction. The amendment to section 1780 of the Code of Civil Procedure which permits a non-resident to sue a foreign corporation in the courts of this State, under certain conditions, did not take away the power of our courts to decline jurisdiction on the ground of *forum non conveniens*, or other reasons rendering a trial here inexpedient.

Hence, a demurrer should not be sustained to a defense set up by a foreign corporation sued by a non-resident which alleges non-residence, alienage and that the defendant is not an inhabitant of the State, and which gives notice that facts will be shown which should lead the court to decline jurisdiction. *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 662.

Jurisdiction of State court — action to recover demurrage charges — interstate commerce.

See COMMON CARRIER, 3.

Supreme Court — jurisdiction — right to compel directors to declare dividends.

See CORPORATION, 1.

Violation of Sanitary Code — transference of case to Court of Special Sessions.

See NEW YORK CITY, 2.

Justice's Court — proceedings liberally construed.

See PLEADING, 2.

Court of Claims — notice of intention to file claims.

See PRACTICE, 2.

COURT — *Continued.*

Justice of the peace — replevin — answer of title.

See REPLEVIN.

Jurisdiction — revocation of trust made in Massachusetts.

See TRUST, 3.

CRIME.

1. *Penal Law, section 720, relating to disorderly conduct in public places construed* — use of offensive language by person on own private property not a violation of statute — slander. The words "in any place," as used in section 720 of the Penal Law providing that "Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person in any place", shall be deemed guilty of a misdemeanor, do not apply to disorderly acts or language by a person while upon his own private property. In order to constitute an offense, the acts committed or language used must have been committed or used in a public place.

Hence, a woman who, while standing in her private residence, no person other than herself and husband being upon her premises, addressed offensive words to another woman and her husband who were in their rear yard adjoining, and such words were spoken in such a tone of voice that they could not be distinguished by others, is not guilty of a violation of the statute.

Such acts at most constitute mere slander for which the aggrieved party may have a civil remedy. *People v. Whitman*, 193.

2. *Robbery in first degree — evidence.* Prosecution of a colored man for the crime of robbery in the first degree. Evidence examined, and held, that the interests of justice require a reversal of the verdict of conviction and a new trial. *People v. Lawson*, 224.

3. *Labor Law, section 8a, construed* — "factory" — emergency repair shop in power house. An emergency repair shop maintained by an electric railway company at its power house, where only lighter parts are made and only four or five machinists and their helpers, seven or eight men in all, are employed, is a "factory" within the meaning of section 8a of the Labor Law, providing for twenty-four consecutive hours of rest in every calendar week.

In construing this section the court should endeavor to ascertain its fair and reasonable meaning, avoiding a construction which either extends or limits its meaning beyond that which was evidently intended. *People v. Transit Development Co.*, No. 1, 288.

4. *Labor Law, section 8a, relating to work on Sunday, construed* — "factory" — establishment for pasteurizing and bottling milk. An establishment for the pasteurizing and bottling of milk is not a "factory" within the meaning of section 8a of article 2 of the Labor Law providing that "before operating on Sunday every employer shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday," etc.

The meaning of the word "factory" employed in section 8a of the Labor Law, is controlled by the definition contained in section 2, notwithstanding subdivision 2 (f) of section 8a added by Laws of 1914, chapter 388, providing that said section shall not apply to certain establishments including "milk bottling plants, where not more than seven persons are employed."

Subdivision 2 (f), which appears on its face to limit the field of operation of the existing statute, cannot be held to have extended it.

It seems, that the exemptions were passed from excess of caution in view of the fact that some of the exempted industries would probably involve manufacture.

There must be some manufacturing in the establishment to bring it within the definition of a "factory" as that word is used in section 2 of the Labor Law. *People v. Stevens Co., Inc.*, 306.

5. *Indictment for felony as second offense — plea of guilty as first offender — when defendant not entitled to indeterminate sentence.* A defendant indicted for the crime of grand larceny, first degree as a second offense, by pleading guilty to the charge as a first offense is not entitled to an indeterminate sentence under section 2189 of the Penal Law, where on an examination

CRIME — Continued.

pursuant to section 485a of the Code of Criminal Procedure he admits that he had been previously convicted of a felony.

By such plea of guilty he escaped the additional punishment which would follow an indictment and conviction as a second offender, but he did not become entitled to the clemency of an indeterminate sentence which the law expressly reserves for a person never before convicted. *People v. Simon*, 660.

6. *Labor Law — employment of female in mercantile establishment after ten o'clock in the evening — sale of chewing gum at booth in amusement park — "mercantile establishment" defined.* A corporation conducting an amusement park which employs a female eighteen years of age to sell chewing gum in a small booth after ten o'clock in the evening is properly convicted of a violation of subdivision 2 of section 161 of the Labor Law.

Such booth for the sale of chewing gum, although of diminutive size, is a "mercantile establishment" within the meaning of the Labor Law. *People v. Luna Amusement Co.*, 797.

7. *Taking and publishing letters or papers without authority in violation of Penal Law, section 553 — when private detective not liable for violation of statute — "publishing."* Where a banking firm, acting as fiscal agent of foreign countries and engaged in the purchase of munitions for them and in daily receipt of a large number of confidential cablegrams, discovered that so-called munition brokers, having desk room in a lawyer's office, were obtaining information as to the contents of said telegrams, and thereupon engaged the services of a licensed private detective, said detective, who, while in the lawyer's office for the purpose of installing a detectaphone, caused unsealed letters to the munition brokers by dealers in war munitions and certain other unsealed papers, copies of letters sent by munition brokers to dealers, to be copied in shorthand by his secretary and later transcribed and delivered to an employee of the banking firm which was prosecuting the inquiry, is not guilty of opening or publishing the letters or papers without authority in violation of subdivision 3 of section 553 of the Penal Law.

In order to violate said subdivision a person must both "take" a paper or a copy thereof and also "publish" it.

The delivery by the private detective of the copies of the letters to a single individual, his employer, who had a legitimate interest in knowing what use was being made of the information stolen from his office and who was not interested in giving general publicity to the facts did not constitute "publishing" within the meaning of the statute. *People v. Burns*, 845.

8. *Crime — hostile attitude of trial judge toward defendant.* Judgment convicting the defendant of an attempt to commit grand larceny in the first degree reversed and a new trial granted because the hostile attitude of the judge toward the defendant during the trial was prejudicial to him so that he was not accorded the fair and impartial trial to which he was entitled. *People v. Milch*, 875.

Attempt to rape — evidence.

People v. Gardner, 947.

Selling indecent literature.

People v. Gleekaman, 882.

Soliciting — evidence.

People v. Sylvester, 923.

Violation of Sanitary Code in city of New York — transferring case to Court of Special Sessions.

See *NEW YORK CITY*, 2.

[For tables containing all sections of the Penal Law and of the Penal and Criminal Codes cited and construed in this volume, see *ante*, p. lxxvi.]

DAMAGES.

Action at law — basis of damages — consideration of acts after commencement of action — consent of parties — municipal corporations — city of New York — liability of contractor in construction of subway to lessee of land for interference with easements of light, air and access. Where, in an action at law by a lessee of property abutting upon a street in the city of New York against a contractor with the city engaged in the construction of the subway,

DAMAGES — Continued.

to recover damages for the interference with the plaintiff's easements of light, air and access, caused by certain structures erected by the defendant, the parties consent to the determination of the defendant's liability for the presence of the structure, which had been transferred to another for a period after the commencement of the action, and such issue is presented to the jury without objection, the defendant is not in a position to attack the recovery upon appeal, although, as a general rule, anything happening after the commencement of an action at law cannot be used as the basis of damages.

A lessee of land abutting on a business street in the city of New York has an easement in the highway for light, air and access by reason of the situation of his property, which cannot be taken from him without just compensation, and the city in constructing the subway through its contractor discharges a proprietary and not a governmental function rendering it liable for any interference with the easements of light, air and access, although the work is done without negligence, in the most approved manner, and for the furtherance of a great public convenience. *Sinsheimer v. Underpinning & Foundation Co.*, 495.

Condemnation of land for water supply — commissioners not bound by expert testimony.

See EMINENT DOMAIN, 3.

Strikes and boycotts — respective rights of employer and employees — injuries by boycott.

See INJUNCTION, 2.

Enforcement in equity of partial assignment — breach of contract of employment.

See MASTER AND SERVANT, 5.

DEBTOR AND CREDITOR.

Suit to set aside fraudulent conveyances — evidence — mortgage upon property conveyed executed after conveyance — evidence of fraudulent intent — lis pendens — cancellation of notice. In a judgment creditor's action to set aside a conveyance alleged to have been fraudulent it was error for the court to exclude evidence offered by the plaintiff to show that after the conveyance the defendants gave two chattel mortgages to other parties on the property conveyed. This because proof of contemporaneous conveyances, no matter to whom made, is always relevant to an issue of fraudulent conveyance.

Evidence of the circumstances under which conveyances are made and the consideration paid therefor, is also relevant on the issue of fraudulent intent.

In granting the nonsuit it was error to cancel the plaintiff's notice of pendency of action before the time to appeal had expired or pending the appeal, for in such action the notice can only be canceled by order of the court upon payment into court, or upon giving the security required by section 1674 of the Code of Civil Procedure. *Wittemann Bros. v. Forman Bottling Co.*, 674.

Disbarment of attorney — aiding judgment debtor to conceal property.

See ATTORNEY AND CLIENT, 7.

Judgment creditor's action against directors of corporation.

See CORPORATION, 2.

Supplementary proceedings — third party order — restraining disposition of property.

See EXECUTION.

Transfer with intent to defraud judgment creditor.

See REAL PROPERTY, 5.

See BANKING.

DECEDENT'S ESTATE.

1. Appeal — practice on appeal from order of Surrogate's Court settling accounts — liability of executor for interest on sums due legatees. Where the Appellate Division on appeal from an order of the Surrogate's Court settling the accounts of an executor and executrix and directing distribution of the

DECEDENT'S ESTATE — Continued.

estate, modifies the decree appealed from but does not in terms remit the matter to the Surrogate's Court for the entry of an order in accordance with its decision, it is not necessary for said court to enter a decree "resetting" its former decree. All that is necessary is to enter an order making the order of the Appellate Division the order of the Surrogate's Court; then the original decree will stand as modified.

Where on such an appeal the sums allowed to the appellants are increased so as to decrease the amounts due to the several distributees, it is proper, although not strictly necessary, to draw the order entered upon the remittitur from this court so as to specify the altered amount to be paid to each distributee.

The executor and executrix in such case being justified in declining to pay the legatees the sums fixed by the original decree, are liable only for the amount of interest earned upon the sums due to the several distributees from the date of the original decree to the date of the payment. This because a debtor is not chargeable with interest as a penalty for non-payment, unless the amount he is to pay is fixed or is ascertainable by computations from fixed factors.

If, however, the appeal had not been successful, and the amounts payable to the legatees had not been reduced in consequence thereof, the executor and executrix would have been chargeable with full interest from the date of the original decree. *Matter of Garabrant*, 23.

2. *Reference of claim against estate — practice — when special findings of fact not necessary — evidence not establishing valid claim for legal services rendered — burden of proof.* On the reference of a claim against an estate which has been rejected by the executors, a referee's report, which in effect results in a nonsuit for failure to establish a valid claim, need not make special findings of fact and conclusions of law separately stated. Moreover, under section 2541 of the Code of Civil Procedure the decision of the surrogate or his referee need not contain separate findings of fact.

Evidence on the reference of a claim against the estate for legal services alleged to have been rendered on the retainer by the decedent examined, and held, insufficient to establish a valid claim against the estate.

Where the alleged legal services involved the right of several stockholders to enjoin a proposed reorganization of a corporation and the claimants proceed against the estate without exhausting their remedy against the other surviving stockholders, they must establish that the decedent was the real and sole party in interest in the suit, or that he had undertaken or directed their employment as attorneys. *Matter of Carpenter*, 165.

3. *Husband and wife — liability of father for burial expenses of incompetent daughter living with mother — evidence — telephone conversations.* A father is liable for the burial expenses of an incompetent daughter over twenty-one years of age, without property and residing with the mother.

A telephone conversation between the father and the mother is admissible to establish the latter's agency in employing an undertaker. It will be assumed from her testimony that in talking over the telephone with her husband, she recognized his voice. *Matter of Van Denburgh*, 237.

4. *Trusts — presumption that duties of executors and trustees named in will are coexistent — presumption that investments were made in their capacity as trustees — defense of investments on accounting.* Where there is no period of time or event suggested in a will when the duties of executors named therein are to cease and their duties as trustees to begin, it will be assumed that the testator intended that their duties should be coexistent.

Where such persons named both as trustees and executors do an act which they have not the right to do as executors, but which they may do as trustees, it will be presumed that they have acted in the latter capacity, and on an accounting they have the right to defend investments made by them by invoking the discretion given them by the will as trustees, so far as it will reasonably cover their acts. *Matter of McDowell*, 243.

5. *Descent of real property — Decedent Estate Law, section 88, construed — evidence insufficient to establish that real property of which intestate died seized came to her on the part of her father.* Section 88 of the Decedent Estate Law, providing for the descent of property, is in derogation of the common law and should be strictly construed.

DECEDENT'S ESTATE — Continued.

Heirs of a decedent, upon her father's side, in order to establish exclusive title in themselves under said statute, must show, *first*, that the property claimed by them as and when it came to the intestate, was an "inheritance," i. e., real estate as distinguished from personal property, and *second*, that it came to the intestate "on the part of the father" directly either by "devise," "gift," or "descent."

Evidence examined, and held, insufficient to establish that the property of the decedent came to the intestate on the part of her father. *Kidney v. Waite*, 260.

6. *Trust — gift to charitable institution under will executed less than two months prior to death.* Where a testator made and executed a will less than two months prior to his death, by which after making a specific bequest and devise to his son, he gave the remainder of his property in trust to pay one-half of the income to his son for life, and the other half to the wife of said son, and further provided that upon the death of either the entire income was to go to the survivor for life, with the further right to dispose of the entire estate by will, and in default of such disposition the trustee was to hold the estate in trust and pay the entire principal sum and all unexpended income to a charitable institution, said attempted gift, the power of appointment not having been exercised, is invalid under section 6 of chapter 319 of the Laws of 1848, as amended by chapter 623 of the Laws of 1903, although said institution was to take only in the more or less remote possibility of the property not being disposed of pursuant to the will. *Matter of Bewsher*, 381.

Notice of death to insurance company.

See INSURANCE, 2.

Foreclosure of mortgage — assignment of bond to executors to secure payment of debt to estate — when mortgagee not entitled to cancellation of mortgage.

See MORTGAGE, 2.

Transfer tax — mortgages and money owned by husband and wife as joint tenants.

See TAX, 2.

Transfer tax — money and mortgages held jointly by husband and wife.

See TAX, 4.

Transfer tax — Federal tax.

See TAX, 6.

See TRUST.

See WILL.

DEED.

Breach of covenant.

See REAL PROPERTY, 1-3.

DEFINITION.

"Factory" defined.

See CRIME, 3, 4.

"Mercantile establishment" defined.

See CRIME, 6.

"Publishing" defined.

See CRIME, 7.

"On or about" defined.

See PUBLIC OFFICER, 1.

"Nephews and nieces" defined.

See WILL, 2.

"Lawful descendants" and "issue" defined.

See WILL, 5.

DEPOSITION.

Representative action to compel directors to account — examination of defendants before trial. Plaintiff, a stockholder, who brings a representative action against his corporation and its directors under sections 90 and 308 of the General Corporation Law to compel the directors to account for moneys

DEPOSITION — Continued.

alleged to have been diverted by them from the corporation, by making improvident contracts with subsidiary corporations whereby the plaintiff was deprived of his share of dividends which should have been declared. is entitled to examine the defendants before trial to elicit proof of facts material to his cause of action which are controverted by the defendants and of which they have knowledge. And this is so, although the plaintiff might make the same proof by other witnesses.

In other words, the plaintiff need not show, in order to be entitled to such examination, that the evidence is absolutely necessary.

Order for examination of defendants modified. *Eckman v. Lindbeck*, 721.

DISBARMENT.

See ATTORNEY AND CLIENT, 2, 3, 7, 8.

DISCOVERY.

Books and papers of corporation — when proper in action to recover percentage of profits due for services. An employee of a corporation who brings an action at law to recover a certain percentage of its net earnings as compensation is entitled to a discovery and inspection of its books containing its business transactions within the period embraced within the cause of action, which tend to establish its net profits for said period.

The fact that the plaintiff demanded judgment for such sum in excess of a certain amount which an accounting may determine him entitled to, does not change the action from one at law to one in equity. Nor does the fact that the contract was denied deprive the plaintiff of his right to a discovery. *Lockwood v. Bedell Co.*, 695.

DIVORCE.

Modification of decree as to custody of child — effect of subsequent marriage of husband.

See HUSBAND AND WIFE, 2.

When interlocutory decree no bar to proceeding against husband for failure to support.

See HUSBAND AND WIFE, 4.

DOMESTIC RELATIONS.

See HUSBAND AND WIFE.

EDUCATION.

When letter to Department of Education not libelous.

See LIBEL.

When educational institution entitled to exemption from tax.

See TAX, 3.

EJECTMENT.

Conveyance claimed to have been forged — evidence — transactions not with decedent but in his presence — when alleged grantee and purchaser on foreclosure is not mortgagee in possession so as to bar ejectment. On an issue as to whether a deed from the plaintiff, under which the defendant claims, was the act of the plaintiff, or is a forged instrument as claimed by the plaintiff, it was error to exclude testimony of the plaintiff offered for the purpose of contradicting the testimony of witnesses for the defendant as to what took place at the execution of the alleged deed, upon the ground that the alleged grantee (since deceased) was present at the execution, if in fact he took no personal part in the transaction which was carried out between the plaintiff and a lawyer as agent of the grantee.

A transaction between a party and the agent of one deceased does not come within the purview of section 829 of the Code of Civil Procedure.

Where the alleged grantee from the plaintiff bought in the lands on a subsequent foreclosure of a prior mortgage, the plaintiff not having been made a party to the suit, the purchaser did not become a mortgagee in possession with the consent of the plaintiff so as to bar an action of ejectment by her, especially so where the purchaser conveyed to third persons who subsequently reconveyed to him and his wife as tenants by the entirety. This, because a mortgagee has no right of possession except by the consent of the mortgagor, which consent is deemed to be revoked whenever the mortgagee transfers his mortgage interest.

EJECTMENT — Continued.

The aforesaid rule applies with special force where the defendant claims under an original deed which the plaintiff contends is a forged instrument. *Burke v. Higgins*, 816.

Easements of riparian owners in lands formerly under water — city may not appropriate easements except by eminent domain — mutual rights in same premises — when ejectment does not lie.

See REAL PROPERTY, 4.

Recovery of lands conveyed under void tax sale.

See TAX, 5.

EMINENT DOMAIN.

1. *Elimination of grade crossings, city of Utica — right of adjoining owner to damages — mandamus to compel condemnation — effort to purchase easements is prerequisite.* By virtue of section 99 of the Second Class Cities Law a landowner in the city of Utica is entitled to damages consequent upon the change of grade in the city street made to eliminate a railroad grade crossing.

But a peremptory writ of mandamus commanding the commissioner of public works of the city to institute condemnation proceedings to determine the damages sustained by a landowner by reason of such change of grade should not issue until said commissioner has made an effort to acquire the rights by purchase pursuant to the provisions of section 92 of the Railroad Law, for it is only in case that he is unable to effect such purchase that he may proceed to condemnation. *People ex rel. Mott Wheel Works v. Hayes*, 301.

2. *Street opening, city of New York — deduction from award for benefits received — foreclosure of mortgage subsequent to condemnation proceedings — respective rights of mortgagor, mortgagee and city.* Where an award on a street opening in the city of New York has been made to a landowner who had previously mortgaged her premises, the city has a right to deduct from the award the amount of an assessment against the owner for the benefit to lands not taken, even though since the vesting of title in the city the mortgage has been foreclosed and a third party has become the purchaser at the sale.

The city was not a party to the foreclosure and its rights were unaffected thereby.

The award for the lands taken stands in the place of the land, and the mortgagee had only an equitable lien thereon to the extent of any deficiency on foreclosure, and where there was no deficiency the entire award belonged to the mortgagor and is subject to assessment for benefits to portions not taken.

Section 1676 of the Code of Civil Procedure relating to the payment of taxes, assessments, etc., on the foreclosure of a mortgage is solely for the benefit of the purchaser and does not affect any right or remedy of the city with respect to an assessment. *Matter of Jones*, 654.

3. *Condemnation of land for water supply — damages — evidence — commissioners not bound by expert testimony.* Application by a water company to condemn unimproved farm land adjacent to other lands owned and worked by it. Evidence examined, and held, that the determination of the commissioners as to the amount of damages should be confirmed.

The value to the owner is not enhanced by the purpose for which the land is taken.

The commissioners are not necessarily bound to accept the figures of an expert witness. It is their duty to consider all of the proof and their conclusion, especially when reached after a view of the premises, should not be disturbed unless they appear to have done injustice by overlooking or disregarding proof before them, or by error in their theory of the award. *Matter of Castle Heights Water Co. v. Price*, 687.

When assignee of devisee entitled to proceeds.

See ASSIGNMENT.

Street opening — interest on awards to unknown owners.

See NEW YORK CITY, 1.

EQUITY.

Obtaining trade or business by fraud.

See INJUNCTION, 1.

EQUITY — *Continued.*

Enforcement of partial assignment — breach of contract of employment — judgment in prior action.

See MASTER AND SERVANT, 5.

When court not bound by receivership clause in mortgage.

See MORTGAGE, 1.

Division of commissions between real estate brokers.

See PRINCIPAL AND AGENT, 6.

Grant to one where consideration paid by another — moral obligation to reconvey.

See REAL PROPERTY, 5.

See ESTOPPEL.

ESTOPPEL.

When State not estopped from enforcing liabilities of stockholders of bank.

See BANKING.

EVICTIION.

Partial eviction — taking of vault space by municipality.

See LANDLORD AND TENANT, 1.

Partial eviction — changing means of access.

See LANDLORD AND TENANT, 2.

Paramount title — action for breach of warranty — damages.

See REAL PROPERTY, 1.

EVIDENCE.

Expert testimony — when medical witness may stipulate for compensation. If a medical witness or other witness with technical qualifications goes beyond mere testimony as to facts observed by the senses and is asked to draw a technical inference or conclusion, he may properly stipulate for compensation.

Hence, where an attending physician of the deceased, having testified on a prior trial as an expert witness for the proponent of the will, at an agreed compensation, was thereafter employed by a succeeding attorney for the proponent at the same terms to go over the witness' records to prepare himself so as to give expert testimony on the issue of the deceased's mental soundness, such agreement for compensation may be enforced. *Birch v. Sees*, 609.

Suit to enforce liability of stockholders of bank — records of public officers as evidence.

See BANKING.

Action on note of business corporation executed by treasurer without authority — execution of similar notes by treasurer and payment by corporation.

See BILLS AND NOTES, 3.

Conditional agreement to furnish plans for building — evidence of failure of condition.

See CONTRACT, 2.

Fraudulent intent.

See DEBTOR AND CREDITOR.

Telephone conversation.

See DECEDENT'S ESTATE, 3.

Oral testimony to establish fraudulent inducements leading up to agreement in writing.

See FRAUD, 1.

Injury to child on highway — evidence of prior accident at same place.

See NEGLIGENCE, 5.

Investigation of municipal department — abrogation of contract — financial condition of contractor.

See NEW YORK CITY, 3.

EVIDENCE — *Continued.*

Varying written instrument by parol.

See REAL PROPERTY, 2.

Custom of others in similar business.

See SHIPS AND SHIPBUILDING.

Will contest — declarations of testator upon issue of undue influence — declaration subsequent to execution of will.

See WILL, 1.

Will contest — past transaction showing family history.

See WILL, 7.

Hearsay evidence as to accident.

See WORKMEN'S COMPENSATION LAW, 2.

When findings of State Industrial Commission conclusive.

See WORKMEN'S COMPENSATION LAW, 10.

EXECUTION.

Judgment — levy against accruing salary unauthorized — garnishment — third party order for examination in proceedings supplementary to execution — restraining disposition of property pending examination. Although a fund representing salary earned, whether in the possession of the employer or of the employee, or of a third person, is not exempt from levy under execution and may be seized wherever found, a levy may not be made against the employer when the salary is not only not due but is only partially earned.

The only way to reach an accruing salary is by garnishment proceedings under section 1391 of the Code of Civil Procedure.

A third party order in supplementary proceedings may be issued against an employer directing an examination concerning its alleged indebtedness, and, pending such examination, restraining the disposition of any property belonging to the judgment debtor. *Hayward v. Hayward*, 92.

FALSE IMPRISONMENT.

Venue of action.

See PRACTICE, 3.

FOOD.

Compound sold as vanilla flavor.

See PUBLIC HEALTH.

FORECLOSURE.

See MORTGAGE.

FORGERY.

Liability of savings bank for paying forged draft.

See BILLS AND NOTES, 2.

FRAUD.

1. *Action for fraudulent misrepresentations inducing transfer of notes and stock — evidence — oral testimony to establish inducements leading up to agreement in writing.* Action to recover damages for alleged fraudulent misrepresentations inducing plaintiff to deliver to defendant certain notes and stock.

Held, that a verdict in favor of the plaintiff is against the weight of the evidence.

Oral testimony to show outside inducements leading up to an agreement in writing are subject to the infirmity that, in proportion to their relative importance, it is unlikely that matters of real moment would be suffered to remain in parol, especially where the beneficiary of such promises is an experienced attorney at law. *Hollenroth v. Mickey*, 742.

2. *Trust — assignment by trustee of bond and mortgage — consideration — rights of purchaser without notice of prior equitable rights — maxim — where equities are equal the law shall prevail.* A law firm engaged in loaning money on bond and mortgage and purchasing and selling real estate and securities formed a mortgage company and whenever it purchased property for clients title thereto was taken in the name of said company, the latter issuing at the time certificates showing the interest of the clients in the

FRAUD — Continued.

particular property. A client gave to a member of the firm cash and securities including a bond and mortgage in trust to invest and reinvest the same and with power to sell. The mortgage company to which said mortgage had been made, executed and issued to the member of the firm as trustee for the client a certificate stating that it had sold the bond and mortgage to said member, as trustee for the client, and agreeing upon the surrender of said certificate to deliver an assignment, but the assignment was never executed and interest was paid by the firm to the client. Thereafter, the member of the firm caused the mortgage company to execute and deliver a similar certificate to a second client who had money on deposit with the firm for investment and the account of said client with the firm was charged with the value of the bond and mortgage and the firm member's account as trustee of the first client was credited with the same amount. Thereafter the second client decided to transfer her account to a trust company, and the mortgage company executed and delivered an assignment of the bond and mortgage to said client which was turned over to the trust company.

Held, on all the evidence, that the second client paid a valuable consideration for the assignment of the bond and mortgage and has a right to retain them as against the first client;

That the first client is entitled to recover from the executors of the partner her share in another mortgage held by said partner, and that said share shall be assigned by the mortgage company to the purchaser thereof.

A *cestui que trust* is not to be debarred from following property which her trustee has stolen or given away without consideration merely because by appointing him trustee she placed him in a position to defraud her.

A purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the real estate at the time of his purchase is entitled to priority in equity as well as at law, according to the well-known maxim that where the equities are equal the law shall prevail. *Behrmann v. Seybel*, 862.

Authority of trustees to set aside fraudulent transfer.

See BANKRUPTCY, 1.

Action by trustee in bankruptcy to set aside fraudulent transfers.

See BANKRUPTCY, 2.

Statute of Frauds — when contract not within statute.

See CONTRACT, 4.

Negligence of party in failing to read paper before signing.

See CONTRACT, 5.

Fiduciary relation of directors to stockholders — constructive fraud by directors — agreement between themselves.

See CORPORATION, 1.

Suit to set aside fraudulent conveyance.

See DEBTOR AND CREDITOR.

Obtaining trade or business by fraud.

See INJUNCTION, 1.

Action on fire insurance policy.

See INSURANCE, 3.

Procuring discharge of subordinate by false reports to superior.

See MUNICIPAL CORPORATION.

Transfer with intent to defraud creditors.

See REAL PROPERTY, 5.

Contest of will.

See WILL, 7.

GAS AND ELECTRICITY.

Application by gas company for leave to issue bonds.

See PUBLIC SERVICE COMMISSION.

GIFT.

Gift by implication.

See WILL, 2.

GUARANTY AND SURETYSHIP.

Canal Law, section 145, construed — action by laborer on bond of contractor — time of commencement of action. The provision of section 145 of the Canal Law, requiring a contractor's bond that the contractor shall pay "at least once each month," is for the benefit of the laborer, and the provision that "no action shall be maintained against the sureties unless brought within thirty days after the completion of the labor" is for the benefit of the surety, and such provisions must be construed and harmonized with reference to the manifest purpose of each.

Although a laborer may maintain an action once in each month for his compensation, he is not required to do so. All that a surety can require is that the action shall be instituted within thirty days after the completion of the labor. *Bronnie v. New England Equitable Insurance Co.*, 331.

Insuring performance of contract — action on bond.

See CONTRACT, 1.

Promise to pay debt of another — consideration.

See MORTGAGE, 2.

Authority under power of attorney to guarantee payment of notes.

See PRINCIPAL AND AGENT, 2.

HIGHWAY.

Liability of contractor constructing subway for interference with easements of light, air and access.

See DAMAGES.

Elimination of grade crossing — right of adjoining owner to damages.

See EMINENT DOMAIN, 1.

Street opening, city of New York — deduction from award of benefits received.

See EMINENT DOMAIN, 2.

Defect in street — evidence of cause.

See NEGLIGENCE, 1.

Injury to motor cycle policeman when pursuing escaping automobile.

See NEGLIGENCE, 3.

Street opening — interest on awards to unknown owners.

See NEW YORK CITY, 1.

Erection of elevated viaduct — right of abutting owner to damages.

See NEW YORK CITY, 4.

Erection of elevated viaduct equivalent to change of street grade — right of owner to damages.

See NEW YORK CITY, 4.

Injury to motor cyclist at grade crossing — contributory negligence.

See RAILROAD, 3.

Injury to passenger alighting from car.

See RAILROAD, 4.

HUSBAND AND WIFE.

1. *Alienation of affection — scienter of defendant essential — evidence not establishing cause of action — failure of defendant to testify.* A plaintiff in an action to recover for the alienation of her husband's affection, she having previously separated from him, is under the burden of proving *scienter* on the part of the defendant, that is to say, that she knew of the relation she was breaking up.

Moreover, facts must appear from which it may be inferred that the woman defendant was the pursuer, not merely the pursued, and she does not become liable because she may have accepted the admiration of the plaintiff's husband.

As the wrong involves moral turpitude, no presumption of guilt can be indulged, unless the facts cannot be otherwise reconciled.

Evidence in such action examined, and *held*, that a judgment for the plaintiff should be reversed because of her failure to prove *scienter* on the part of the defendant.

As the plaintiff had not proven a cause of action when she rested no inference against the defendant can be drawn because she was not sworn

HUSBAND AND WIFE — Continued.

in her own defense, for she was not obliged to contradict or explain facts which were insufficient to establish her liability. *Loper v. Askin*, 163.

2. *Divorce — modification of decree as to custody of child — evidence — effect of subsequent marriage of husband in foreign State — effect of subsequent marriage of wife — financial and social situation of parent — education of child — interest of child.* Upon a reference on a motion for the modification of a decree of divorce as to the custody of an infant, unlimited investigation into the antecedents of the parties and their respective families during the period of their differences which culminated in their separation and final divorce, aside from the guilt of the defendant proven in the divorce action, does not tend to establish that as to moral and intellectual fitness, or in parental affection, either party in comparison with the other is unworthy to have the custody of the child, in whole or in part, but merely tends to prolong the reference.

It is error on such a reference for the referee to exclude evidence establishing defendant's guilt in the divorce action and showing its character as gross and continued, and not casual, temporary and exceptional.

As a general rule, the custody of children of divorced parties, especially of the only child, will be given to the innocent party.

The remarriage in another State of the defendant in a divorce action, contrary to the decree of divorce of the court of this State, does not impair his fitness to have or share in the custody of his only infant child, but where such marriage is to a concededly respectable and worthy woman, with whom he has lived an entirely exemplary life, it may to some extent increase his fitness.

The remarriage of the plaintiff in a divorce action to an entirely worthy and respectable man does not diminish her just claim to the custody of her infant child.

The fact that the defendant in a divorce action was financially able to provide his nine-year-old daughter and only child with better educational advantages and social opportunities than the mother could furnish where she lived, is not a sufficient ground for depriving her of the custody of the child.

Where a divorced father has agreed to pay \$500 per month for the maintenance, support and education of his nine-year-old daughter until she becomes fourteen years of age, and the court has ordered that she be allowed to visit with the father at a distant place at frequent intervals, the father's request that his daughter have private instruction should be granted by the court, as attendance at any school, public or private, with such frequent interruptions, would be utterly impracticable.

Although the interest of the child is the paramount consideration upon the question of its custody, it is not the exclusive consideration, and the natural right of the parent is an important factor, especially where it has not been forfeited by gross misconduct. *Lester v. Lester*, 205.

3. *Validity of judgment annulling marriage, where court had no jurisdiction — application by plaintiff to set aside said judgment — due process of law — conduct of plaintiff authorizing divorce no defense — jurisdiction to set aside marriages — common-law marriage — want of jurisdiction.* The plaintiff in an action for the annulment of her marriage in which a judgment of a court of equity was entered in her favor, although the court had no jurisdiction, there being no statutory ground for the annulment, is entitled to have the judgment set aside, by a justice other than the one who presided at the trial, not because of any equitable consideration for her, but because the judgment does not rest upon jurisdictional facts, and because she has not been deprived of her marital rights by due process of law.

The fact that the conduct of the plaintiff justifies the granting of a divorce is not available to the defendant in this action to prevent the setting aside of the judgment of annulment secured through an imposition upon the court and in which it did not have jurisdiction.

There is no general equitable jurisdiction to set aside marriages. The power to deal with matrimonial actions must be found in the statutes.

Wherever there is want of authority to hear and determine the subject-matter of a controversy, an adjudication upon the merits is a nullity and does not estop even an assenting party.

HUSBAND AND WIFE — Continued.

Where two parties, there being no legal impediment to the contract of a marriage between them, procure a marriage ceremony to be performed in the State of New Jersey, but fail to secure the proper license, and upon returning to this State cohabit as man and wife and mutually introduce each other as husband and wife to many people, a common-law marriage within this State is effected.

Want of jurisdiction, which is a pure question of law, may always be asserted and raised directly or collaterally, either from inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof which is always admissible for that purpose. *Davidson v. Ream*, 362.

4. *Failure of husband to support wife — conviction as disorderly person — interlocutory decree of divorce and separation agreement no bar to proceeding.* An interlocutory judgment for absolute divorce does not terminate the marriage of the parties, and they remain husband and wife until the entry of the final decree.

A wife who has obtained such interlocutory judgment, but has not entered final judgment is not debarred from instituting a proceeding under section 685 of the charter of the city of New York against her husband as a disorderly person because of his failure to support her.

Neither is such proceeding debarred because the parties had previously entered into a formal separation agreement in which the husband agreed to pay a certain sum for the wife's support, if he has failed to fulfill his agreement. *Kingsbury v. Sternberg*, 435.

5. *Agreement by husband to pay wife a certain sum per month executed prior to divorce — specific performance — adequate remedy at law.* A plaintiff divorced from her husband in another State is not entitled to enforce by specific performance an agreement made after the parties separated and before the divorce whereby the defendant agreed to pay her for her life or until her remarriage, a certain sum per month, as she has an adequate remedy at law. *Thompson v. Thompson*, 610.

6. *Separation — effect of former judgment of limited separation — findings necessary before entry of subsequent judgment for permanent separation.* Where, in an action for a separation from bed and board forever, the trial court finds as a matter of law that the plaintiff is entitled to a judgment of separation for a period of one year and that the parties or either of them may after the expiration of said period apply to the court to have such judgment made permanent, modified or discharged, the court, after the expiration of the judgment for one year, has no authority to enter a judgment permanently separating the parties, without permitting the presentation of new findings upon all of the evidence.

In such an action the power of the trial court is limited to dismissing the complaint, or granting a judgment for a separation from bed and board forever, or for a limited time, as the evidence may warrant.

After the judgment for one year entered in this case had been fully executed and had ceased to exist by its own limitation, the parties were left exactly where they were prior to its rendition and possess the same legal rights as to a separation from bed and board forever, that they possessed when the action was commenced.

In actions for separation the Code of Civil Procedure provides for the kind of judgment and gives no authority to the court to reserve any question or to modify or change the judgment entered, except to revoke the same as authorized by section 1767. *Pollitzer v. Pollitzer*, 744.

7. *Annulment of marriage — temporary alimony and counsel fees.* The allowance of temporary alimony and counsel fees to the wife in an action to annul a marriage is to be determined, not alone by the husband's means, but by the wife's necessities. Thus, where it appears that the wife has an ample income of her own her motion for alimony and counsel fees should be denied. *Brand v. Brand*, 822.

Liability of father for burial expenses of incompetent daughter.

See DECEDENT'S ESTATE, 3.

When husband not dependent on wife — death benefit.

See INSURANCE, 4.

HUSBAND AND WIFE — Continued.

Liability of wife for labor in improving her land — agency of husband.
See PRINCIPAL AND AGENT, 3.

Money and mortgages held jointly — transfer tax.
See TAX, 2, 4.

INCOMPETENT PERSON.]

Trust for benefit of incompetent — disposition of accumulated income.
See WILL, 6.

INFANT.

Liability of orphan asylum for negligence in choosing incompetent servants.

See NEGLIGENCE, 11.

Deed of trust with direction to pay income to use of infant — when duty of administering income devolves upon trustee not general guardian.
See TRUST, 1.

INJUNCTION.

1. *Equity — obtaining trade or business by fraud and deception.* Where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect the honest trader and restrain a dishonest one from carrying out his scheme.

Hence, where a dealer in gowns procures a person to misrepresent herself as a private customer and purchase gowns from another dealer of exclusive designs, and removes therefrom the trade mark and exhibits such gowns and copies thereof to its customers, representing them to be its own importation, not created by the dealer from which the original was purchased, it should be enjoined from exhibiting and selling such gowns.

Such dealer, however, has a legal right to copy and to sell as its own creations the exclusive models designed by another, if the models or an inspection thereof are procured by fair means. *Monteget v. Hickson, Inc.*, 94.

2. *Labor unions — strikes and boycotts — respective rights of employer and employees — motive — combination and conspiracy to wrongfully injure business of another — evidence justifying injunction and assessment of damages.* Suit in equity brought against the business agent and members of a local labor organization of teamsters, etc., to obtain a permanent injunction restraining acts alleged to amount to a boycott upon the plaintiff's trucking business, and to recover resulting damages. It appeared that before the alleged wrongful acts of the defendant the plaintiff had conducted a large and lucrative business; that on the organization of the local union efforts to induce the plaintiff's employees to join the same were largely unsuccessful, as well as efforts to induce the plaintiff to bring his employees into the organization. As a result of rancor and ill-feeling aroused between the plaintiff and the defendants, the latter adopted a resolution declaring the plaintiff to be "unfair," which resolution was approved by other labor organizations of the locality which sustained the attitude of the defendants. There followed a systematic campaign among the customers of the plaintiff by which strikes were threatened if they continued business relations with the plaintiff, and as a result many persons who had previously done business with the plaintiff ceased to do so, whereby the plaintiff's business was in a large part destroyed. It further appeared that upon the granting of the injunction by the trial court many of these persons resumed business relationships with the plaintiff. On all the evidence, *held*, that a decree granting the permanent injunction, with \$1,000 damages for injuries already sustained, should be affirmed.

The respective rights of employer and employees rests upon the right of individuals freely to contract, which right is guaranteed to each by our Constitution. The employees are free to contract for the disposal of their services and the employer may employ whom he will.

In the absence of contract to the contrary, either employer or employee may terminate the employment at will with or without reason for such action.

Moreover, the employee has a right to threaten to terminate the employment with or without reason, such threat being a threat to do only what

INJUNCTION — *Continued.*

he may lawfully do. The employer has the equal and coextensive right to threaten to discharge.

Moreover, striking employees may lawfully importune customers and business associates of the employer to cease business dealings with him, in other words, induce a boycott.

But such methods cannot be used in the furtherance of an unlawful or malicious purpose, that is to say, the right of boycott cannot be made an engine of oppression for oppression's sake only. Hence, in determining the rights of parties, motive is important, for if the primary purpose of such boycott be punishment, revenge or injury, then the possible good to labor conditions cannot be made a cloak to shield the actors from the consequences of acts done in furtherance of the unlawful purpose.

Held, further, that the acts of the defendants were contrary to subdivisions 5 and 6 of section 580 of the Penal Law, prohibiting conspiracies to prevent another from exercising a lawful trade or calling and acts injurious to public trade or commerce.

Subdivision 6 aforesaid is not inapplicable on the theory that the business conducted by the plaintiff could be as well done by other persons, so that public trade will not be injured, when in fact it appears that before the boycott the plaintiff was doing the major portion of that work in the locality.

As the boycott successfully put the plaintiff out of business and removed one of the competitors, it tended to disrupt and obstruct the free flow of commodities and chattels.

Irrespective of the statutes, by the common law it is unlawful to combine for the purpose of destroying the business of another.

The intent of the defendants is a question of fact for the trial court, and may be established by circumstantial evidence. *Auburn Draying Co. v. Wardell*, 270.

3. *Right to restrict use of trade name after surrendering right thereto to another.* A person, even after he has surrendered to another the right to use his name in business, still preserves sufficient interest in it to prevent its use by a stranger.

Hence, where one of two brothers who had the right by the dissolution of a partnership agreement to continue the business and use the firm name, dies and another person or corporation assumes the right to use said name, the other brother is entitled to injunctive relief against the stranger's appropriation of said name. *Ohlbaum v. Correa*, 838.

Right of agent to sell similar products after termination of agency — right to use own trade name.

See **CONTRACT**, 9.

Restrictive covenant in deed construed — retail stores.

See **REAL PROPERTY**, 6.

INSURANCE.

1. *Indemnity against liability for injuries caused by automobile — policy construed — requirement that assured notify insurer of accident — delay in giving notice.* Where a policy indemnifying the owner of an automobile against liability for accidents requires the assured to give immediate written notice to the insurer upon the occurrence of an accident with the fullest information obtainable and further requires him to give like evidence with full particulars if a claim is made on account of such accident, it is necessary for the assured to give notice in each case of accident in order to preserve the benefit of the policy, although, the accident being slight, he had no immediate reason to suppose that a claim would be made against him by the person injured.

Thus, there can be no recovery on such policy where no notice of an accident was given to the insurer until ten days had elapsed and when an action was brought against the assured. *Haas Tobacco Co. v. American Fidelity Co.*, 267.

2. *Life insurance — provisions of constitution of beneficent association providing for notice of accident construed — necessity for notice after accident and also after death — construction of insurance contract.* Where the constitution of a beneficent association provides that a member sustaining

INSURANCE — Continued.

an accident shall give notice thereof within ten days, and that if death result, notice must be given within ten days thereafter, "which death notice shall be in addition to the notice of the accident and shall state the cause of death," it is not necessary that there be two notices in all cases where death results from an accident more than ten days thereafter.

The quoted provision means that when notice of the accident is given by the injured member, and he thereafter dies as a result of such accident, a notice of death must again be given, notwithstanding the first notice.

Moreover, if an injured member has given notice of his injury and made claim for compensation under his certificate, and subsequently dies, the notice thus given is not sufficient and a notice of death must also be given, "which death notice shall be in addition to the notice of the accident."

But where the accident results in death, notice within ten days thereafter is sufficient, although no prior notice of the accident was given.

Where there is any doubt or uncertainty as to the meaning of a contract of insurance, it must be resolved in favor of the insured, the insurer being responsible for the language used. *Hammill v. Order of United Commercial Travelers*, 338.

3. *Action on fire insurance policy — defense — fraud — discrepancy between itemized statement of loss and plaintiffs' inventory and sales book — verdict not against weight of evidence — instructions — question as to amount of recovery.* In an action to recover upon a standard fire insurance policy issued by the defendant, the defense of fraud was interposed and it was claimed that the itemized statement of the goods damaged and destroyed by the fire did not harmonize with the plaintiffs' inventory and sales book, nor with the inventory made by the defendant, but the evidence showed practically as many and as far-reaching errors against the plaintiffs' interests as against those of the defendant.

Held, that with the presumption in favor of honest and fair dealing, it cannot be said that the verdict in favor of the plaintiffs is against the weight of the evidence.

As the plaintiffs sued to recover only the defendant's portion of the total insurance, defendant's request that the jury be asked to determine the total amount of the loss, does not raise the question of amount of recovery, especially since there was no exception directly to the charge of the court that if the defense of fraud was not established the plaintiffs were entitled to the full amount of the policy. *Sharlet v. Hanover Fire Ins. Co.*, 374.

4. *Cigarmakers' International Union of America — action by surviving husband of member to recover benefit — evidence — when husband not dependent on wife — husband not relative of wife — appeal — judgment must be sustained on theory presented in court below.* Action by the plaintiff against the president of the Cigarmakers' International Union of America to recover under the constitution of said union the amount of the funeral and death benefit to which the beneficiary of his deceased wife, a member of said union, would be entitled, on the theory that he as surviving husband was dependent upon his wife in some degree for his support. Evidence examined, and *held*, insufficient to sustain such a theory, and that a judgment in favor of the plaintiff should be reversed.

A husband in the full possession of his faculties, earning a livelihood for himself and wife, and with her assistance preparing fowls for customers and keeping trifling accounts, is in no legal sense dependent upon her.

A husband is not a relative of his wife. They are merged in one during life, and upon the death of either the survivor cannot bear any relationship to the decedent.

A judgment on appeal must be supported, if at all, upon the theory on which it was rendered. *Tierney v. Perkins*, 391.

5. *Life insurance — Insurance Law, section 92, construed — sufficiency of notice of forfeiture — reference to right to paid-up policy — limitation of action to enforce agreement for reinstatement of policy after forfeiture.* In was not intended by section 92 of the Insurance Law to require a specification in a notice of forfeiture of a privilege that did not exist in the insurance policy, and, hence, an omission of a reference in the notice to a right to a paid-up policy is immaterial where there was no such right under the policy in question.

INSURANCE — Continued.

The effect of the provision of said section that "No action shall be maintained to recover under a forfeited policy unless the same is instituted within two years from the day upon which default was made in paying the premium, instalment, interest or portion thereof, for which it is claimed that forfeiture ensued," is that where the policy has in fact been forfeited and it is claimed that the insured has become entitled to have it reinstated by reason of a subsequent agreement or otherwise, the agreement to reinstate it must be made effective by a decree of the court reinstating the policy, or else the action to enforce it on the theory that by the agreement it became reinstated, notwithstanding the forfeiture, must be commenced within the time specified in the statute.

It was competent for the Legislature to prescribe a statutory limitation with respect to the bringing of actions on policies thereafter forfeited. *Thompson v. Postal Life Insurance Co.*, 490.

6. *Indemnity against theft of motorcycle — policy construed — insurance issued to vendor and to conditional vendee — theft of motorcycle by vendee — when insurer liable to vendor — waiver of requirement as to notice — evidence — conditional bill of sale.* Where an insurance policy covering the loss of a motorcycle by theft was issued both to the seller of the machine and to the purchaser under a conditional bill of sale "as interest may appear" and covered loss "by theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured" both the interest of the vendor and the conditional vendee were insured, and as respects the vendor's interest in the policy the vendee was not within the exception.

Hence, where the conditional vendee himself stole the motorcycle, the vendor is entitled to recover of the insurance company.

Although the policy of insurance was to be void unless the insured rendered a sworn statement of loss to the insurer within sixty days of the loss, the defendant by denying its liability before the sixty days had expired waived the requirement as to notice.

In such action the conditional bill of sale was properly admitted in evidence. *Neal, Clark & Neal Co. v. L. & L. & G. Ins. Co., Ltd.*, 730.

Fire insurance — proofs of loss.

Christgau v. Standard Fire Ins. Co., 948.

INTEREST.

Interest on legacies.

See DECEDENT'S ESTATE, 1.

Awards to unknown owners — street opening.

See NEW YORK CITY, 1.

INTERSTATE COMMERCE.

Application of Workmen's Compensation Law.

See WORKMEN'S COMPENSATION LAW, 9.

JUDGMENT.

Levy against accruing salary — garnishee.

See EXECUTION.

JUDICIAL SALE.

Deduction of amount of mortgage from purchase price paid by grantee.

See MORTGAGE, 2.

LABOR UNION.

Strikes and boycotts — respective rights of employer and employees — motives.

See INJUNCTION, 2.

Cigarmakers' union — recovery of death benefit.

See INSURANCE, 4.

Action founded upon alleged violation of by-laws — priority of members as respects employment.

See PLEADING, 1.

LANDLORD AND TENANT.

1. *Action for rent — counterclaim — breach of covenant of quiet enjoyment — partial eviction — taking of vault space by city of New York — when covenant of quiet enjoyment implied — Real Property Law of 1896, section 216, construed.* In an action to recover rent under a lease containing no express covenant of quiet enjoyment, the defendant may, by counterclaim, recover damages for the breach of such a covenant which will be implied, caused by his partial eviction from the premises by the city of New York taking possession of a portion of the vault space occupied by the tenant in connection with the leased premises.

The rule under the Revised Statutes that a covenant for quiet enjoyment is implied in every lease and is broken when the tenant is evicted from part of the premises, either by the lessor or by a third party having paramount title, is not affected by section 216 of the Real Property Law of 1896 (section 251 of the present law), providing that "a covenant is not implied in a conveyance of real property whether the conveyance contains any special covenant or not."

Said statute is strictly limited to "a conveyance of real property" and does not include a conveyance of a leasehold or interest, because such an estate or interest is not included in the term "real property" as defined by section 1 of the Real Property Law of 1896.

The definition of real property in the article of the Real Property Law of 1896, dealing with the recording of instruments, is expressly confined to said article and is not applicable to section 216. *Fifth Avenue Building Co. v. Kernochan*, 19.

2. *Action for rent — defense — partial eviction.* Where, in an action under a written lease to recover the rent of a store, it appears that the tenant, although he had not rented the garret or stairway leading thereto, had been given the privilege of using the same, the fact that the landlord subsequently, upon rearranging the store, changed the means of access to the garret; but in no way disturbed the tenant's use thereof, does not effect a partial eviction of the defendant so as to constitute a defense to the action. *Giesen v. Metzler*, 858.

Failure of landlord to provide lateral support during excavation on adjoining land — when tenant may recover damages.

See NEGLIGENCE, 9.

LARCENY.

Hostile attitude of judge.

See CRIME, 8.

LEASE.

When covenant of quiet enjoyment implied.

See LANDLORD AND TENANT, 1.

LIBEL.

When letter by principal of high school to State Department of Education referring to president of board of education not libelous — pleading — statement inconsistent with facts alleged — affirmative allegation of previous denial adds nothing to pleading — affirmative defense — allegation as to truth or justification or mitigation — burden of proof — instructions to jury. A letter written by the principal of a high school to the State Department of Education containing some uncomplimentary suggestions to the president of the board of education, but of such character as to be privileged and not bearing upon its face evidence of malice, is not libelous in the absence of evidence of malice.

Where, in an action for libel based on said letter, the defendant admits writing the letter, but denies that the same was written maliciously or that the matters therein contained were false, and alleges on information and belief that the statements in the letter are and were true, the latter allegation not being pleaded as a defense, but having been introduced as an affirmative of the previous denial that "the same was written maliciously or that the matters therein contained were false" adds nothing to the pleading as an answer.

The allegations of a complaint are controverted or put in issue only by a general or specific denial.

LIBEL — *Continued.*

The material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged or from which a general denial may be implied or inferred.

As the plaintiff alleged that the matters contained in the defendant's letter were maliciously composed and circulated, and that the letter contained "false, defamatory and libelous matter," and the material matters of malice and of falsehood were denied by the defendant, the burden of proof was upon the plaintiff.

Since the issue of the alleged falseness of the letter was raised by the allegations of the complaint and the denials of the answer, and did not depend upon any affirmative defense, the court properly refused "to charge in this connection that where the defendant pleads the truth or justification or mitigation, the burden is on the defendant as to those matters." *Mayer v. Chamberlain*, 326.

Complaint.

Johnson v. Dithridge, 884.

LIEN.

1. *Mechanic's lien* — *failure to file within ninety days* — *when lien may not be filed for restoring sidewalk in connection with contract.* Where, in an action by a subcontractor for the foreclosure of a mechanic's lien under a contract to excavate earth and rock, it appears that the excavation was completed more than ninety days prior to the filing of the lien, and that work performed by the plaintiff in restoring sidewalks within the ninety days before filing the lien constituted no part of the improvement made upon the land for the benefit of the owner, the complaint should be dismissed.

The only work for which a lien may be filed is the work which the contractor is engaged to perform in improving the premises.

The contract being merely to excavate, and the interference with the walk having been made for the convenience of the contractor, the duty to restore the walk, whether implied or expressed, constituted no part of the improvement made upon the land for the benefit of the owner for which a lien could be filed either by a contractor or by a subcontractor. *Colon & Co. v. Smith*, 100.

2. *Attorney's lien on proceeds of judgment in hands of city chamberlain* — *extent of lien* — *practice* — *reference.* In fixing the lien of an attorney on funds, the proceeds of a judgment, in the hands of the chamberlain of the city of New York it is improper to include moneys due to another attorney not an attorney of record, which have not been paid over to said attorney by the petitioner, or to include sums representing disbursements in collateral matters. In such case the matter will be remitted to a referee to ascertain what parts of the disbursements were incurred in the action for which the plaintiff is entitled to a charging lien. *Lebaudy v. Carnegie Trust Co.*, 614.

Mechanic's lien — *foreclosure.*

See CONTRACT, 8.

LIMITATION OF ACTION.

Action to recover for overpayment for electricity.

See CONTRACT, 7.

Action by laborer on bond of contractor on canal.

See GUARANTY AND SURETYSHIP.

Enforcing agreement for reinstatement of insurance policy after forfeiture.

See INSURANCE, 5.

Recovery of balance due on salary.

See NEW YORK CITY, 5.

Liability of wife for labor and materials in improving her land — promise of payment — payments on running account.

See PRINCIPAL AND AGENT, 3.

Ejectment to recover possession of lands conveyed under void tax sale.

See TAX, 5.

LIQUOR TAX LAW.*See* INTOXICATING LIQUORS.**MANDAMUS.**

Conservation Law — levy and collection of moneys expended by Conservation Commission in fighting fires — mandamus to compel supervisor to pay over such moneys to Conservation Commission — constitutional law — parties entitled to raise constitutional question. Where a board of supervisors proceeding under the Conservation Law has levied the sum claimed by the Conservation Commission to be due from the town for the expenditures made by the Commission in fighting fires in said town, and such money has been duly collected and paid over to the supervisor, he may be compelled by a writ of peremptory mandamus, issued on the application of the Attorney-General, to pay over such moneys to the Conservation Commission.

A constitutional question may be raised only by a person whose rights are involved.

The supervisor being a mere custodian of moneys raised in regular form for a particular purpose, has no authority to question the propriety or the legality of the expenditures underlying the levy and collection of the taxes.

Questions as to the liability of the town for expenditures made by the Conservation Commission in fighting fires should have been raised in connection with the assessment and levy of the tax. *Matter of Attorney-General v. Taubenheimer*, 321.

Compelling condemnation proceedings — effort to purchase easements prerequisite.

See EMINENT DOMAIN, 1.

When not prerequisite to action to recover salary.

See NEW YORK CITY, 5.

When term of sheriff chosen at special election begins to run.

See PUBLIC OFFICER, 1.**MASTER AND SERVANT.**

1. *Pleading — action against master for personal injuries — defense alleging that Compensation Commission has disallowed claim — demurrer.* A demurrer to a separate defense contained in the answer of an employer sued by an employee for personal injuries which alleges that the State Workmen's Compensation Commission has determined that the plaintiff's claim was not founded upon an accident and was disallowed should be sustained. *Naud v. King Sewing Machine Co.*, 31.

2. *Pleading — action against master for personal injuries — defense alleging that award for compensation was made to plaintiff — demurrer.* A demurrer to a separate defense of an employer sued by an employee for personal injuries which alleges that an award was made to the plaintiff pursuant to the provisions of the State Workmen's Compensation Law which the defendant stands ready and willing to pay should be overruled.

But on overruling the demurrer the complaint should not have been dismissed but the plaintiff should have been given leave to withdraw the demurrer upon paying costs. *Corico v. Smith*, 33.

3. *Workmen's Compensation Law, State of New Jersey — action on said statute brought in courts of this State — failure of plaintiff to show compliance with foreign statute — preliminary determination by judge of Court of Common Pleas of New Jersey essential.* The Workmen's Compensation Act of the State of New Jersey, which confers a cause of action for the death of an employee who duly elects to take under said statute and to relinquish his common-law rights and any other statutory rights of his dependents in case of his death, requires the claimant in a death case, as a prerequisite to action on said statute, to have the amount of the weekly indemnity and the present value thereof first determined by a judge of the Court of Common Pleas of the State of New Jersey. Hence, the courts of this State will not entertain an action based on said statute where it is brought in total disregard of all of the provisions thereof relating to a preliminary determination by

MASTER AND SERVANT — Continued.

a judge of said foreign court of controversies respecting the facts and the right of the claimant to receive a gross sum.

It seems, moreover, that even where such action may be maintained in our courts, the plaintiff must show that he is a person who would be entitled to administration on the estate of the decedent in New Jersey. *Verdicchio v. McNab & Harlin Manufacturing Co.*, 48.

4. *Negligence — death of machinist in ice-making plant — evidence not justifying recovery.* Action brought under the Employers' Liability Act to recover for the death of a person employed as machinist and repairman in an ice-making plant. The decedent who had undertaken to make repairs to certain machinery was found on the following day dead and frozen at the bottom of an elevator shaft. There was evidence that some of his bones were broken and that there were internal injuries. Evidence examined, and held, insufficient to support a verdict for the plaintiff and that a new trial should be granted. *Meissner v. Atlantic Hygienic Ice Co.*, 169.

5. *Assignment of claim — action for breach of contract of employment — defense — judgment in prior action by assignee of claim for breach of contract — damages — enforcement in equity of partial assignment — waiver of rule that only one recovery may be had on same cause of action.* Where, in an action for wrongful discharge, it appears that the plaintiff was employed for a term of one year beginning January 1, 1916, at a stated salary per week; that he commenced work on January seventeenth and after about three weeks was discharged; that on February fourteenth he made an assignment of his claim for damages for a breach of the defendant's agreement "covering all damages which have accrued to me or may accrue up to March 6, 1916, reserving to myself all damages which may accrue after said date;" that on February twenty-fourth the assignee brought an action in the Municipal Court against the defendant in which the pleadings were oral and in which a judgment was rendered for the plaintiff, and that the defendant had no knowledge or means of knowing that the assignment was a partial one, said judgment is a defense in the present action and the complaint should be dismissed.

A plaintiff's claim in an action for wrongful discharge is for unliquidated damages resulting from the master's breach of the contract of employment, and so far as regards the period subsequent to the dismissal only a single cause of action accrues, although compensation is payable in installments.

If a servant elects to sue for damages for a breach of the contract prior to the expiration of the term of employment, he may recover for the whole term.

There can be but one recovery for a single breach of a contract.

A party cannot split a single cause of action and bring several actions to recover the damages flowing therefrom. Nor can he split a single cause of action into several parts and by assignment give the right to others to severally sue to recover their part.

While a court of equity recognizes and enforces a partial assignment, it does not allow the recovery of a partial amount in favor of the assignee in one suit and the maintenance of another action by the assignor, but insists that all the parties interested in the cause of action must be before the court that all their rights may be adjusted in one action.

The rule that where one suit has been brought and recovery had for a portion of the claim, a subsequent action thereon is barred, is for the protection of the debtor, and may be waived by him. *Carvill v. Mirror Films, Inc.*, 644.

6. *Negligence — injury caused by sudden starting of team — when servant not engaged in master's business.* Where the servant of the defendant employed to drive an ice wagon stopped and picked up a pail which had fallen from a truck driven by the plaintiff and again stopped his team for the purpose of allowing the plaintiff to reclaim the pail, he was not at the time engaged in his master's business, and hence, where the defendant's servant suddenly started his team with the result that the plaintiff was struck and injured by the whiffletree, the defendant is not liable, for the servant was acting in his own behalf and for his own purposes. *Hume v. Elder*, 652.

MASTER AND SERVANT — *Continued.*

7. *Negligence* — *validity of release from liability for personal injuries — want of consideration — when void as against public policy — when release executed by express company cannot be invoked by railroad company.* An agreement of release between an express company and its employee purporting to hold harmless the express company or any transportation company by whom or by whose servant said employee might be injured, void as against public policy for want of consideration, cannot be invoked by a railroad company in an action by said employee against it for the negligence of one of its servants in so handling a freight truck as to injure the employee. *Kelly v. Central Railroad of New Jersey*, 685.

Action for services — examination of books and papers.

See DISCOVERY.

Strikes and boycotts — respective rights of employers and employees.

See INJUNCTION, 2.

Liability of municipal employees for procuring discharge of subordinate by false reports.

See MUNICIPAL CORPORATION.

Death of station agent while crossing tracks — contributory negligence.

See RAILROAD, 2.

MORTGAGE.

1. *Foreclosure — receivership clause, when binding upon tenant — equity not bound by such clause — when rents collected from subtenants should be paid to tenant by receiver.* A provision in a recorded mortgage on real estate which entitles the mortgagee to an appointment of a receiver of the rents and profits, without notice and without regard to the adequacy of the security in case of default by the mortgagor, is binding upon a subsequent lessee of the premises, as he took his lease with notice of said provision.

Moreover, the tenant takes his lease subject to having the rents of his subtenants impounded by a receiver in case of a foreclosure.

But such receivership clause does not entitle the mortgagee to the appointment of a receiver as a matter of right.

Nothing can move a court of equity to action except equity and good conscience, and the court will adjust its relief to work substantial justice; hence, where it appears that the lease was made in good faith, and not for the purpose of defeating the rights of the mortgagee, and the lessee has paid the rent to his landlord, the mortgagor, during the period the rent of the subtenants had accrued, the court in its discretion properly directed the rents of the subtenants to be paid to the tenant when collected by the receiver. *Schwarz v. Alexander*, 641.

2. *Deduction of amount of mortgage from purchase price paid by grantee — assignment of bond to executors to secure payment of debt to estate — when mortgagee not entitled to cancellation of mortgage — promise to pay debt of another founded upon valuable consideration — when mortgagee takes subject to such promise.* Where a remainderman entitled to lands under a will mortgaged his remainder to the executors to secure a bond held by them and as to which for a valuable consideration the remainderman had agreed to indemnify and hold harmless the obligor on the bond, a purchaser of the mortgage premises who paid to his grantor, the remainderman, only the difference between the purchase price and the amount of the mortgage and who took subject to the mortgage, is not entitled to have the instrument canceled or to a decree requiring the executors to collect a sum due to the estate from the mortgagor by means of his personal note given to them, rather than by enforcing the bond secured by the mortgage, which bond the executors held by an assignment.

Such a decree would enable the mortgagee and his assigns to acquire the lands for less than the purchase price, as the amount of the mortgage debt had been deducted.

The mortgagee has no standing to contend that there was no privity between the mortgagor and the obligor of the bond or the executors, for a person for a valuable consideration may agree to pay the debt of another and to secure such payment may mortgage his lands. *People's Trust Co. v. Doolittle*, 802.

MORTGAGE — *Continued.*

3. *Agreement by owner of mortgage that plaintiff shall have secondary interest therein — contract construed — agreement not creating trust relationship — extension of time of payment — when owner of secondary rights in mortgage not entitled to maintain foreclosure — receivership.* Where the defendant insurance company holding a bond and mortgage by assignment agreed with the plaintiff that he should have an interest in the mortgage to a certain amount, but that the defendant should be the owner of the balance and that its ownership was to be superior to that of the plaintiff, as if the latter's interest were a junior mortgage, and the defendant was entitled to satisfy the mortgage, being only required to account to the plaintiff for his interest, and the defendant had a full right to foreclose in case of default in which case the plaintiff was only to have a right to an accounting for moneys received in excess of the defendant's interest and the latter's rights were made irrevocable, there was no trust relationship between the parties, and hence the defendant at the maturity of the mortgage had a right to extend the time of payment at the request of the owner of the equity of redemption.

Such extension of time did not give the plaintiff the right to bring a suit of foreclosure, that right being vested solely in the defendant.

It follows that, where the plaintiff brought an unauthorized suit of foreclosure, the defendant is entitled to have an order appointing a receiver vacated. *Clare v. New York Life Insurance Co.*, 877.

Foreclosure subsequent to condemnation proceedings — respective rights of mortgagor, mortgagee and city.

See EMINENT DOMAIN, 2.

Rights of purchaser in good faith and without notice.

See FRAUD, 2.

Foreclosure — when remainders not vested — distribution of surplus.

See WILL, 4.

MOTOR VEHICLE.

Indemnity against liability for injuries by automobile — policy construed.

See INSURANCE, 1.

Indemnity against theft of motor cycle — construction of policy.

See INSURANCE, 6.

Injury to motor cyclist at grade crossing — contributory negligence.

See RAILROAD, 3.

Injury to passenger on street car by auto truck — contributory negligence.

See RAILROAD, 4.

Injury to intending passenger while within eight feet of car, by automobile.

See RAILROAD, 5.

MUNICIPAL CORPORATION.

Master and servant — liability of municipal employees for procuring discharge of subordinate by false and malicious reports to superior — privileged communications between employee and superior — malice — pleading — complaint. A supervising employee, acting in good faith, may truthfully report to his superior the acts, delinquencies, disqualifications and inefficiency of subordinate employees over whom he is charged with the duty of supervision, and thereby procure their discharge, without liability to the discharged employee, even though his act in so doing was promoted by ill-will, enmity or the desire to secure such discharge, for the reason that in so doing he is exercising a legal right and performing his legal duty.

But a superior employee has no right to falsely, without regard to the truth and actuated only by enmity and malice, make an unjustified and malicious report to a superior officer, for the purpose of accomplishing the removal of an honest, faithful and competent employee, who stands in the way of "graft," and he is liable for the damages occasioned by his malicious, false and unjustified act.

The privilege of making known to a superior the incompetence of a subordinate does not extend or protect beyond such statements as are made in the performance of duty, believing them to be true, and for words not material and spoken falsely and maliciously an action will lie.

MUNICIPAL CORPORATION — Continued.

The presence of malice in reporting to the common master or employer is immaterial providing the reporting employee keeps within his qualified legal privilege in exerting his influence.

Complaint in an action by an inspector in the department of water supply, gas and electricity of the city of New York against other employees of said department based solely upon intentional, wrongful and malicious acts of the defendants, resulting in damages to the plaintiff, depriving him of his lawful employment and injuring his name and character and reputation, examined and held, to state a cause of action.

No rule of public policy prevents the maintenance of such an action nor does it interfere in any manner with the right of a superior employee to truthfully report to his superior or the common employer the acts of inefficiency of a coemployee, even though in so doing he is actuated by ill-will or a desire to procure the discharge of such subordinate. *Woody v. Brush*, 698.

Collection of moneys from county by Conservation Commission for fighting fires.

See MANDAMUS.

Action by city to recover amount of judgment against it for personal injuries — defect in street caused by steam company.

See NEGLIGENCE, 1.

Duty of policeman to use care when pursuing automobile.

See NEGLIGENCE, 3.

Liability for damages for injuries resulting from snow and ice.

See NEGLIGENCE, 4.

Liability of town for injury to child.

See NEGLIGENCE, 5.

Injury to pedestrian by slipping and falling on icy sidewalk.

See NEGLIGENCE, 7.

Ordinances of city of Buffalo requiring protection of excavations.

See NEGLIGENCE, 9.

Authority of the board of health of New Rochelle.

See NEW ROCHELLE, CITY OF.

Abrogation of contract.

See NEW YORK CITY, 3.

Erection of elevated viaduct equivalent to change of street grade.

See NEW YORK CITY, 4.

Removal of county officer by Governor — costs of defense.

See PUBLIC OFFICER, 2.

Automobile — ordinance requiring machines to stop within eight feet of standing street car.

See RAILROAD, 4, 5.

See CORPORATION.

NEGLIGENCE.

1. *Municipal corporations — action by city to recover amount of judgment against it for personal injuries — defect in asphalted street caused by steam — evidence — testimony that water from leaking main maintained by plaintiff came in contact with defendant's steam pipes.* In an action in which the city of New York seeks to recover the amount of a judgment recovered against it for personal injuries resulting from a depression in a street caused by the softening of the asphalt by steam which the plaintiff contends escaped from an underground steam pipe maintained by the defendant, it was error to exclude evidence offered by the defendant to show that the steam was caused by a leak in the plaintiff's water main which allowed water to come in contact with the defendant's steam pipe, thus generating the steam which caused the injury.

It was also error to exclude evidence that an excavation made by the defendant five days after the accident showed that the plaintiff's main was leaking, for the elapse of five days was not sufficient to deprive the testimony of value as evidence. *City of New York v. New York Steam Co.*, 79.

NEGLIGENCE — Continued.

2. *Injury by explosion of soda water bottle — evidence raising question for jury.* Action to recover for personal injuries caused by the explosion of a soda water bottle purchased from the defendant. It appeared that the defendant bought empty bottles and charged them in its factory with soda water and that such bottles would not stand more than fifty pounds pressure, and that as a matter of fact there were from ten to twelve explosions a week in the defendant's factory.

On all the evidence, *held*, that it was error for the court to dismiss the complaint at the close of plaintiff's case, as the question of the defendant's negligence should have been submitted to the jury. *Nolan v. Fach*, 115.

3. *Municipal corporations — duty of motorcycle policeman to use care when pursuing escaping automobile — injury to such officer by colliding with truck — evidence.* A police officer on a motorcycle engaged in pursuit of an automobile, the operator of which has violated the speed regulations, must use ordinary care, although the speed ordinances do not apply to him when in the performance of his duty.

Evidence in an action by such an officer for personal injuries sustained by colliding with defendant's truck at a crowded street junction while in pursuit of a speeding car and proceeding at night at the rate of thirty-five miles an hour, examined and *held*, that a verdict in favor of the plaintiff was against the weight of the evidence, and that the complaint should be dismissed. *Miner v. Rembt*, 173.

4. *Municipal corporations — liability for damages for personal injuries resulting from snow and ice on sidewalks — rule of liability of larger cities in southern part of State not applicable to small municipalities in northern part of State — evidence.* The rule of liability of large cities in the southern part of the State for damages for injuries resulting from the accumulation of snow and ice on the sidewalks cannot be applied to small municipalities in the northern part of the State during severe winter weather.

In an action against a village situated in the northern part of the State for personal injuries resulting from a fall on a sidewalk, it appeared that said walk was better kept than others in the village, but that hard snow and ice had accumulated during severe winter weather, to a depth of from two to five inches, so that the center of the walk was higher than at the edges. Evidence examined, and *held*, insufficient to establish the negligence of the defendant. *Mitchell v. Village of Dannemora*, 239.

5. *Municipal corporations — liability of town for injury to minor while walking along footpath over sandy bank adjoining highway — evidence of prior accident at same place.* Where in an action against a town for personal injuries, it appears that the plaintiff, a boy about nine years of age, in order to avoid a team approaching through a cut in a sandy country road, went upon a footpath not made or maintained by the town, which was about three feet wide and within twelve to twenty-five inches of the sandy bank forming the cut into the road, and the bank gave way, it was reversible error to allow a witness to testify that at the same place about ten years before the present accident, in the winter time and in the evening, while passing over the path, which was covered with snow, ice and slush, she slipped off the bank and broke her shoulder.

From the lapse of time and the difference in the circumstances, such evidence was incompetent to show the dangerous condition of the footpath or notice to the town.

Under the circumstances shown, the town cannot be held to have been negligent. *Van Buren v. Town of Bethlehem*, 254.

6. *Failure of hospital attendants to guard against suicide of patient — evidence raising question for jury — duties of private hospital corporation and attendants — failure to prove whether hospital was operated by corporation or by individual defendant.* Action against an incorporated hospital and an individual as codefendants to recover for the death of a patient who was being treated for alcoholism and who committed suicide by breaking the glass of a lavatory window and leaping therefrom. There was no evidence that the decedent had exhibited indications of suicidal mania, but there was evidence to the effect that he suffered from an alcoholic delusion that he was threatened with bodily injuries from an imaginary foe from whom he had an impulse to escape. Evidence examined, and *held*, to raise a question

NEGLIGENCE — Continued.

for the jury as to whether the physician or nurse in attendance should not in the exercise of the requisite skill and care, have foreseen the casualty and have protected the decedent from the unguarded window in the bathroom.

It is the duty of the owner of a sanatorium conducted for private gain to use reasonable care and diligence not only in treating but in safeguarding a patient, measured by the capacity of the patient to provide for his own safety. And to this end physicians and nurses possessing reasonable learning and skill such as is ordinarily possessed by persons similarly engaged must be employed, and they must act with reasonable care and diligence.

A verdict for the plaintiff against both the corporation and the individual defendant will be reversed, however, where there was no evidence upon which the jury could base a finding that the hospital was operated by the corporation and by the individual defendant jointly as master of the negligent servant. *Robertson v. Towns Hospital*, 285.

7. *Municipal corporations — injury to pedestrian by slipping and falling upon icy sidewalk* — evidence. In an action against a city to recover for personal injuries sustained on a certain date by slipping and falling upon ice upon a sidewalk, plaintiff's evidence tended to show that the ice at the place where she fell was from one to two inches in thickness, very hard, rough, uneven and that one witness had slipped upon it four days before, and it had impressed others as being dangerous. The defendant called no witnesses except the government weather observer and relied upon his record as showing that the icy condition was produced by alternate rain, snow, thawing and freezing on the two days preceding the accident.

Held, on all the evidence, that a judgment in favor of the plaintiff should be affirmed. *Johnson v. City of Buffalo*, 295.

8. *Injury by steam shovel — alleged intoxication of operator — evidence not justifying recovery.* Action to recover for personal injuries caused by the operation of a steam shovel, the defendant's liability being predicated upon the intoxication of the employee who was operating the machine. Evidence examined, and *held*, that a judgment for the plaintiff should be reversed because plaintiff's evidence as to the intoxicated condition of the defendant's servant was inherently improbable and unworthy of credence and because the evidence to the contrary was overwhelming. *Garno v. Burgard*, 302.

9. *Personal injuries caused by excavation — failure to provide lateral support — evidence justifying recovery — municipal corporations — ordinances of city of Buffalo requiring protection of excavation by sheetpiling — common-law rights of lateral support — when landowner cannot escape liability by employing independent contractor — tenant may recover damages resulting from failure to provide lateral support.* Action to recover damages for personal injuries. The defendant, a landowner in the city of Buffalo, was engaged in the construction of a theatre and had excavated over eleven feet perpendicularly below the curb line on the boundaries of its lot adjacent to a cement sidewalk which gave access to premises of which the plaintiff was a tenant. Although the ordinances of the city of Buffalo require any person intending to excavate to notify the owner of adjoining premises and also to support the adjoining land with sheetpiling where the excavation goes to a greater depth than four feet, neither the defendant nor its contractor had in any way complied with these ordinances with the result that, while the plaintiff was passing over the cement walk, it gave way owing to a cave-in underneath the walk of the soil adjacent to the excavation into the excavation caused by prior heavy rains, and she fell into the excavation. Evidence examined, and *held*, sufficient to charge the defendant and its contractor, as codefendant, with sufficient notice of the dangerous condition of the excavation and that they should have taken means to avert the danger if they had exercised reasonable care so that defendant's negligence was properly submitted to the jury.

In such action it was proper to charge in substance that the jury might base the defendants' negligence upon their failure to protect the excavation with sheetpiling as required by the municipal ordinance.

However, even if it were error to receive said ordinance in evidence, a verdict for the plaintiff was justified by the other evidence.

NEGLIGENCE—Continued.

The plaintiff as tenant of the adjoining building had a right of lateral support, and under the circumstances the defendants may be held liable for their failure to furnish such support.

It seems, that the right of lateral support does not include the right of the support of an adjoining building which increases the lateral thrust, which latter right can only be acquired in this State by grant or covenant, express or implied, although in England it may be acquired by prescription.

By common law a landowner who by excavating removes the lateral support from adjoining land takes the risk of resulting damages however careful he may be, and he cannot, by delegating the work of excavation to another, escape liability for such damages.

The plaintiff as tenant of the adjoining building and having right of access thereto over the cement sidewalk is entitled, personally, to recover damages, which are not confined to those suffered by her landlord.

Although at common law in the absence of a covenant there is no right of lateral support where an increased weight is placed upon the soil by buildings, there is a right of lateral support for the additional burden imposed by a small sidewalk and by the weight of a human being walking thereon.

The common council of the city of Buffalo were authorized to enact as a valid regulation the ordinance requiring such excavations to be guarded by sheetpiling. This, under subdivision 5 of section 17 of the charter empowering it to prescribe general regulations for the erection of all buildings, and also under subdivision 11 of section 17, the general welfare clause conferring police powers. Such ordinance did not attempt to abrogate a settled rule of the common law but on the contrary to enforce such rule. *Bergen v. Morton Amusement Co., Inc.*, 400.

10. *Real property—liability of owner for injuries resulting from failure to protect foundation exposed by excavation—sale of house to wrecking company—conveyance not recorded until after accident.* Where a building and its foundations abutting upon a public street have been put in a dangerous condition by reason of a deep excavation made for the purpose of lowering the street grade to pass under a bridge, the owner does not escape liability for injuries to a pedestrian who, while lawfully upon the sidewalk, was struck by a stone which fell from the foundation, merely because after the excavation he has sold the building to a wrecking company so as to constitute a legal severance of the building from the land.

Quære, as to whether the liability would exist if the menace from the building began after such legal severance from the land.

Likewise, the owner of an undivided interest in the land does not escape liability by a deed executed before, but not recorded until after, the accident. *Kelly v. Washburn*, 664.

11. *Liability of orphan asylum for negligence resulting in choice of incompetent, unskillful and careless servants—trial—failure of counsel in opening to refer to essential allegations of complaint—erroneous nonsuit.* The general principle protecting public institutions such as orphan asylums from liability in actions for negligence does not include their negligence resulting in the choice of incompetent, unskillful and careless servants.

The fact that in an action against such an institution the counsel for the plaintiff in his opening omitted to refer to allegations that the defendant in disregard of its duties negligently, carelessly and recklessly hired and furnished to the plaintiff incompetent, unskillful and careless superintendents, agents, teachers, guides and employees and that plaintiff's injuries were sustained by reason of such negligence, recklessness and wrongful conduct of the defendant, does not warrant the dismissal of the complaint.

But, *it seems* that, if counsel had stated that he had abandoned said charge or had admitted that he could not establish it or if such change of attitude had been elicited by inquiry of the court or of his opponent or in consequence of the affirmative assumption of the latter, then the complaint might properly have been dismissed. *Goodman v. Brooklyn Hebrew Orphan Asylum*, 682.

Motor vehicle—collision on highway—joint tort feassors. *Sanford v. Brady*, 939.

Failure of party to read paper before signing—fraud.

See CONTRACT, 5.

NEGLIGENCE—Continued.

Failure of corporation to audit canceled checks.

See CORPORATION, 3.

See MASTER AND SERVANT, 1-4, 6, 7.

See RAILROAD, 1-5.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW ROCHELLE, CITY OF.

Municipal corporations—authority of board of health to maintain action for violation of ordinance—power of board to enlarge its own powers—action in City Court—demurrer—motion to dismiss. A city board of health has authority to bring an action except such as may be conferred by statute.

Section 383, subdivision 2, of the charter of the city of New Rochelle authorizing the board of health "to abate all nuisances detrimental to the public health or dangerous to human life, by action at law or in equity in the name of the city," does not authorize an action by said board for a penalty for violation of an ordinance.

A board of health cannot enlarge its own powers to bring actions by provision in the local sanitary code.

In an action by the board of health brought in the City Court objection as to the power to bring such action cannot be taken by demurrer, and is properly raised by a motion to dismiss at the close of the evidence. *Board of Health of New Rochelle v. Farrell*, 714.

NEW YORK CITY.

1. *Street opening—amendment to charter allowing interest on awards to unknown owners is retroactive—claimant to such award entitled to interest although condemnation was instituted prior to amendment.* Chapter 466 of the Laws of 1901, which amended section 1002 of the charter of the city of New York relating to the condemnation of lands for street openings in said city, by providing that on default of payment of awards made to unknown owners the city shall remain liable for such awards deposited with it with "interest thereon from a day one year after the date upon which title vested in The City of New York to the person or persons who may thereafter be found entitled to the same," is retroactive and applicable to condemnation proceedings which were instituted before the amendment went into effect. Hence where a person established his right to an award made to unknown owners he is entitled to interest according to the terms of said amendment. *Matter of Baker*, 1.

2. *Municipal corporations—violation of Sanitary Code—evidence—jurisdiction—transfer of case to Court of Special Sessions—Inferior Criminal Courts Act, section 44, as amended, construed.* Prosecution of a defendant for the violation of section 124 of the Sanitary Code of the city of New York. Evidence examined, and held, sufficient to justify a conviction.

Where in such a case it appears that the magistrate before whom the defendant was first arraigned did not undertake to hold a Court of Special Sessions, but sat merely as a committing magistrate, and as such held the accused to answer under section 208 of the Code of Criminal Procedure, it was unnecessary for said magistrate in order to transfer jurisdiction to the Court of Special Sessions to make an order remitting the case for trial to said court, as provided by section 44 of the Inferior Criminal Courts Act of the City of New York as added by chapter 531 of the Laws of 1915. Said section has no application when the magistrate merely sits as a committing magistrate.

A city magistrate, merely because under certain circumstances he may become a Court of Special Sessions, does not thereby lose his power and authority as a committing magistrate, and when he sits as such his jurisdiction, power and duty are prescribed by chapter 7 of the Code of Criminal Procedure, section 188 *et seq.*

If a single magistrate enters upon a trial as a Court of Special Sessions, under section 44 of the Inferior Criminal Courts Act, as amended, and after so doing sees fit for any of the reasons stated in that section to remit the trial to another Court of Special Sessions, whether held by one magistrate or by three justices, he must make an order to that effect in order to

NEW YORK CITY — *Continued.*

confer jurisdiction upon the court to which the case is remitted to proceed with the trial thereof.

If, however, a city magistrate before whom a complaint is made does not undertake to hold a Court of Special Sessions, but sits merely as a committing magistrate, his powers and duties are prescribed by the Code of Criminal Procedure, and it is sufficient that he hold the defendant to answer. Thereupon the Court of Special Sessions, composed of three justices, will, upon information filed, and in a proper case, have jurisdiction to try the accused, or, if the crime charged be not triable before the Court of Special Sessions, the accused may be tried upon indictment. *People v. Sellaro*, 27.

3. *Evidence — investigation of municipal department under section 119 of the charter of the city of New York — abrogation of municipal contract — question as to financial condition of incorporated contractor — refusal of witness to answer — contempt — refusal to obey subpoena duces tecum — practice.* Where in an examination into the administration of the office of the commissioner of the department of water supply, gas and electricity in the city of New York, pursuant to section 119 of the charter, it is a question whether the commissioner was guilty of acts "contrary to the interests of the City of New York" in declaring a municipal contract abandoned and terminated, an officer of the corporation with which the contract was made when called as a witness is not entitled to refuse to answer questions bearing upon the financial condition of his company and its ability to perform the contract upon the theory that the evidence calls for the disclosure of business secrets.

Such testimony is not irrelevant upon the ground that the only question involved is the good faith of the commissioner, for, while the commissioner is personally interested in the outcome of the investigation, the interests of the taxpayers of the city are equally involved.

Neither is such witness excused for failing to obey a subpoena to produce the corporation's books and papers on such investigation.

Although such witness was properly adjudged to be guilty of contempt, and a decision to that effect has been granted by the court, it is irregular to commit the witness for contempt without entering the order, when on subsequently appearing in the investigation he persisted in a refusal to testify. Hence a commitment issued under such circumstances without notice will be vacated and the matter remitted to the Special Term for the entry of the proper order. *Matter of Wallstein*, 140.

4. *Municipal corporations — erection of elevated viaduct equivalent to change of street grade — statutory right of abutting owner to damages.* Where an elevated viaduct supported upon columns was erected over a street in the city of New York for use by the general public as a means of travel there was, legally, a change of grade, although the street below was left at its original grade.

In the absence of statute giving a right thereto, no damage can be recovered by an abutting owner because of such change of grade.

But when the city of New York erected said viaduct over One Hundred and Fifty-fifth street, pursuant to the authority of chapter 576 of the Laws of 1887, which viaduct was accepted by the city as completed in 1893, there was a statute in force (Laws of 1882, chap. 410, § 873) which required the board of assessors to estimate the loss and damage which each owner might sustain by reason of such change in grade and to make a just and equitable award of the amount of such damage.

Hence, there being no limitation as to the time within which the board must act, and as section 951 of the New York charter, as amended, provides that all cases where a change of grade has been made prior to said act shall be governed by the laws in force at the time such change of grade was completed and accepted by the city authorities, an abutting owner is entitled to a determination of his claim for damages resulting from the erection of said viaduct, and, on certiorari brought for that purpose, the court will direct the board of assessors to hear and determine the claim upon the merits.

The city having first resisted the claim for damages upon the theory that there was a change of grade on the erection of said structure, cannot afterwards, in order to defeat the claim, take the position that there was no change of grade. *People ex rel. Crane v. Ormond*, 151.

NEW YORK CITY — Continued.

5. *Police officers — increased salary after promotion dates from anniversary of appointment for probationary service — action by police officer to recover balance due — limitation of action — New York charter, section 302, construed — defenses — acceptance of salary — accord and satisfaction — mandamus not prerequisite to action — failure of civil service commission to certify patrolman's name.* When section 284 of the charter of the city of New York was amended by chapter 278 of the Laws of 1907, providing that service on the police force of said city during the period of probation under the rules of the municipal civil service commission shall be deemed to be service in the uniformed force if succeeded by a permanent appointment, the advancement of a patrolman who has been appointed permanently after serving his period of probation should occur each year on the anniversary or semi-anniversary of his probationary appointment, and not on the anniversary or semi-anniversary of his permanent appointment.

Hence such patrolman, having been successively promoted, was entitled automatically to the increase of salary on the anniversaries of the date of his probationary appointment; and where by error his increased salaries have been paid only from the later anniversaries, he is entitled to recover the difference from the city.

The two years' Statute of Limitations contained in section 302 of the city charter does not relate to such action, but, on the contrary, relates only to suits by police officers concerning disciplinary fines and punishments. The six years' Statute of Limitations is the only statute affecting said action.

The plaintiff, by accepting his salary under the erroneous ruling that the increase was to date from the anniversaries of his permanent appointment, did not waive his claim against the city for the balance legally due.

Nor did the acceptance of said salary amount to an accord and satisfaction.

It is no defense to said action that the plaintiff did not invoke the writ of mandamus to compel the police commissioner to place his name on the payroll at the proper rate.

Nor is it a defense that the civil service commission never certified any list containing the plaintiff's name, for the fact that the plaintiff was regularly advanced by the police commissioner, after examination for promotion, establishes his efficiency and good conduct.

Nor is it a defense that no appropriation was made to pay the compensation of the plaintiff at the legal rate, as he was entitled thereto by the specific terms of the statute. *O'Connor v. City of New York*, 550.

6. *Public health — municipal corporations — Sanitary Code — invalid provision that owners of proprietary medicines shall register ingredients with board of health — ordinance not ratified by Legislature — power of court to protect trade secret — regulation requiring person to give evidence against himself for use in criminal proceeding — police power.* While the department of health of the city of New York has power to enact a sanitary code, regulations made by it are open to attack on the ground of unreasonableness if they have not been specifically ratified by the Legislature. But a regulation enacted by the Legislature, or specifically ratified by it after enactment by the board of health, cannot be attacked upon the ground aforesaid.

Section 117 of the Sanitary Code adopted by the board of health of the city of New York and not ratified by the Legislature, which in effect requires manufacturers of proprietary or patent medicines either to print the formula of the medicine upon the package, or, if not so printed, to register the ingredients in the department of health where the information is to be regarded as confidential and not open to inspection by the public or any persons other than the official custodian of said records and such persons as may be authorized by law to inspect the same, is invalid upon the ground of unreasonableness.

This, because the formula when kept as a trade secret is property which, in a proper case, may be protected by the court against an unauthorized disclosure, which is possible under the provisions of said Sanitary Code.

It seems, however, that it is not a valid objection to a law or ordinance properly within the scope of police power that its enforcement may incidentally injure or destroy a profitable business.

The court may declare said ordinance invalid although it relates only to the sale of medicines within the city of New York so that the proprietors of

NEW YORK CITY — *Continued.*

such medicines can deal freely elsewhere, for they are entitled to protection against even a partial interference with their business if unlawfully threatened.

As the purpose of said ordinance is to secure information upon which to have prosecutions for violations of the law forbidding the sale of certain habit-forming drugs, it is also invalid upon the ground that it requires a person to furnish evidence against himself for use in a criminal prosecution, it being admitted that, in the case at bar, the medicines of the plaintiffs contain no such ingredients in unlawful quantities.

The ordinance may be declared invalid upon the ground aforesaid even though some of the owners of the proprietary medicines are corporations. *Fougera & Co., Inc., v. City of New York*, 824.

Salary of clerk. *McLoughlin v. City of New York*, 884.

Dismissal of policeman.

See CERTIORARI.

Street opening — deduction from award of benefits — rights of mortgagor, mortgagee and city.

See EMINENT DOMAIN, 2.

Easements of riparian owners in lands formerly under water — respective rights of city and owners.

See REAL PROPERTY, 4.

NEW TRIAL.

Newly-discovered evidence — condition that plaintiff be allowed to read testimony of witness on prior trial — right of defendant to offer impeaching statements or affidavits without laying foundation therefor. On a motion by the defendant in an action for personal injuries for a new trial on the ground of newly-discovered evidence, the court may impose as a condition that the plaintiff may read on the new trial the testimony given by one of its witnesses at the first trial, where such witness, now in a foreign State, has made an affidavit to the effect that he knowingly committed perjury on the first trial at the instigation of plaintiff's attorney, and is also under pressure of indictment procured by the defendant, by whom his family has been supported for several months; but the defendant, if the plaintiff reads such testimony, should be allowed to offer impeaching statements or affidavits without laying the foundation therefor by previous questions to the witness.

In this way the jury may hear the evidence as already given, together with the impeaching evidence, and so decide where the truth lies. *Fried v. New York, New Haven & H. R. R. Co.*, 309.

PARENT AND CHILD.

Respective rights of parents to custody after divorce.

See HUSBAND AND WIFE, 2.

PARTNERSHIP.

Dissolution — partnership at will — joint adventure to accomplish specified object — when joint adventurers cannot terminate agreement and exclude fellow-adventurer — accomplishment of enterprise. Where a partnership is not limited as to time and there is nothing to show the intention of the parties as to its duration, it is a partnership at will and may be terminated at any time at the option of a partner.

But where a partnership, or joint adventure, has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished, and until that time arrives one partner cannot terminate the partnership and continue the enterprise for his own benefit.

Such partnership or joint adventure for the achievement of a specified result can only be terminated by the consent of all the partners interested.

Action by a testamentary trustee for an accounting as to a share of commissions alleged to be due to his testator who, with the defendants, had embarked in a joint adventure to find a purchaser for a manufacturing plant under an agreement to divide the commissions earned. Evidence examined, and *held*, that as the joint adventure was entered into for the accomplishment of the purpose aforesaid and as that result had actually

PARTNERSHIP — *Continued.*

been achieved by the testator's partners, their attempt to repudiate the agreement and to deprive him of his share of the profits was ineffective and they should be required to account.

Said joint adventure cannot be said to have been impossible of accomplishment so as to end the partnership when as a matter of fact the object was accomplished. *Hardin v. Robinson*, 724.

Agreement to repurchase bonds sold to customer.

See **CONTRACT**, 3.

PARTY.

Action by trustee in bankruptcy against corporation, its officers and transferees to set aside transfers — when no misjoinder of parties.

See **BANKRUPTCY**, 2.

Certiorari — review of assessment against railroad company — right of another company to intervene.

See **TAX**, 1.

PATENT.

Optional agreement to pay usury in addition to interest on sale of patent rights.

See **USURY**.

PENAL CODE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxvi.]

PENAL LAW.

[For table containing all sections cited in this volume, see *ante*, p. lxvi.]

PHYSICIAN.

Failure of hospital attendants to guard against suicide of patient.

See **NEGLIGENCE**, 6.

PLEADING.

1. *Complaint — action against unincorporated labor union founded upon alleged violation of by-laws and constitution — priority of members as respects employment and discharge — complaint stating cause of action.* Action against the president of Typographical Union No. 6, an unincorporated association consisting of seven or more persons, to recover damages to the plaintiff, a member, caused by the fact that the action of the executive committee of the union, which is alleged to be illegal and contrary to the constitution of the union, deprived the plaintiff of his position. The complaint in substance alleged that under the constitution of the international and local unions there was a priority law by which when compositors were discharged by reason of a necessary decrease in the force employed in printing offices, the men who were employed first were to be discharged last and the men who were discharged last were to be the first to be re-employed. He further alleged that while he was in the employ of a printing company, the controlling interest thereof was purchased by another publisher and that the local typographical unions or chapels, which had priority agreements with both of said publishers, met and passed resolutions alleged to be contrary to the constitution, as a result of which the employees of the purchasing company obtained a priority over the employees of the company by which the plaintiff had been employed, as the result of which he lost his position which was taken by an employee of the purchasing company. Complaint examined, and *held*, to state a cause of action and that a demurrer thereto was properly overruled. *Hamilton v. Rouse*, 81.

2. *Justice's Court — proceedings liberally construed — action against express company for loss of goods — allegations on contract and in tort — waiver of tort — election of remedies — surplusage.* If it is doubtful whether an action is brought in tort or on contract, every intendment is in favor of construing the complaint as setting forth a cause of action on contract on the theory that the tort has been waived.

Proceedings in a Justice's Court being informal, are to be liberally construed with a view to substantial justice.

If a defendant is in doubt as to the nature of the cause of action it should appear before the justice and take proper steps to protect its rights.

PLEADING — *Continued.*

When the complaint is so uncertain that its exact meaning is not apparent, and it might be held to sound in tort or in contract, the court can compel an election by the plaintiff as to the theory upon which he will proceed.

When a plaintiff serves a verified complaint with the summons in a Justice's Court, and upon the return day appears in court and asks judgment under the provisions of the Code of Civil Procedure permitting judgment to be taken only in an action upon contract, he thereby makes his election.

Where such a complaint alleges that the defendant express company undertook to carry goods for and deliver them to the plaintiff, and that it failed to deliver them as agreed, and further alleges on information and belief that the goods were lost through the negligence of the defendant, the court was justified in determining that the action was upon contract.

The latter allegation as to the negligence of the defendant may be disregarded as surplusage. *Finkelstein v. Barrett*, 233.

3. *Answer — counterclaim for conversion of promissory note set up in action on independent contract — allegations not constituting counterclaim for substantial or nominal damages.* A counterclaim set up by a defendant sued for the value of services and disbursements which alleges in substance that the defendant became an accommodation indorser for the plaintiff on a note without consideration and upon the plaintiff's agreement that he would use the note only for the purpose of renewing and retiring prior notes, and that the plaintiff, instead of so doing, permitted the former notes to go to protest so that the defendant was obliged to pay them and converted the renewal note to his own use and delivered it to a stranger "who claims to be a *bona fide* holder thereof in due course," should be dismissed as insufficient, there being no allegation that the defendant has paid the note or that the plaintiff who was primarily liable thereon is insolvent.

Said counterclaim does not set up a cause for conversion as the defendant did not own the note, and in any event the conversion would not be a proper counterclaim in the action brought upon an independent contract.

Said counterclaim does not state facts entitling the defendant even to nominal damages. *Nugent v. Rowland*, 454.

4. *Remedy for frivolous pleading — motion to strike out answer or part thereof as frivolous, unauthorized — appeal — order denying motion to strike out denial in answer as frivolous not appealable.* The Code of Civil Procedure does not authorize the striking out of an answer or any part thereof on the ground that it is frivolous.

The remedy for a frivolous pleading is a motion for judgment thereon under section 537 of the Code of Civil Procedure. But the relief afforded by this section can only be granted where the whole answer is frivolous, where there is no affirmative defense, the theory being that there is, in effect, no answer at all and, therefore, the plaintiff should have judgment as for a failure to answer.

On granting a motion for judgment on the ground of the frivolousness of the pleading, the pleading adjudged to be frivolous is not stricken out, but remains upon the record and becomes a part of the judgment roll.

A plaintiff is not entitled to appeal from so much of an order denying his motion for judgment on an answer as frivolous as denies his motion to strike out a denial as frivolous, as he is not "a party aggrieved" within the meaning of section 1294 of the Code of Civil Procedure. He will be deemed to have appealed from the whole order. *Hagedorn-Merz Co. v. Burns*, 483.

Action by trustee in bankruptcy against corporation to set aside transfers.
See **BANKRUPTCY**, 2.

Complaint — action to recover penalty for refusal to exhibit hunting license.

See **CONSERVATION LAW**.

Complaint — injunction.

See **CONTRACT**, 9.

Action to compel declaration of dividends.

See **CORPORATION**, 1.

PLEADING — Continued.

Statement inconsistent with facts alleged — affirmative defense.

See **LIBEL**.

Action against master for personal injuries — defense alleging that Industrial Commission has disallowed claim.

See **MASTER AND SERVANT**, 1.

Action for personal injuries — defense alleging award for compensation to plaintiff.

See **MASTER AND SERVANT**, 2.

Complaint, procuring discharge of subordinate by false reports — malice.

See **MUNICIPAL CORPORATION**.

Amendment of complaint — action for commissions in procuring orders for goods.

See **PRINCIPAL AND AGENT**, 1.

Action by real estate broker against another broker for commissions.

See **PRINCIPAL AND AGENT**, 6.

Negligence — denial that injuries were caused on defendant's road.

See **RAILROAD**, 1.

Goods sold and delivered — answer.

See **SALE**, 6.

POLICE.

Dismissal of policeman in New York city.

See **CERTIORARI**.

Duty of motorcycle policeman to use care when pursuing automobile.

See **NEGLIGENCE**, 3.

Increased salary after promotion.

See **NEW YORK CITY**, 5.

PRACTICE.

1. *Demurrer to counterclaim — inadvertent failure to renew demurrer to same counterclaim in amended answer — motion to open default granted.* Where, in an action for foreclosure, the plaintiff demurred to a counterclaim and thereafter the defendant served an amended answer containing the same identical counterclaim, and the plaintiff inadvertently omitted to renew the demurrer until his time had elapsed by a few days, he should be allowed to open his default, and, on such a motion, the sufficiency of the counterclaim should not be definitely passed upon. *de Moro v. Tull*, 17.

2. *Court of Claims — Code of Civil Procedure, section 264, construed — "notice of intention to file claim."* Where a claim is filed with the Court of Claims and with the Attorney-General within six months after it accrues, it is equivalent to a "notice of intention to file," and is a substantial compliance with section 264 of the Code of Civil Procedure.

The object of said requirement of the Code is to enable the State to prepare to meet the claim, and if the claim is filed in both offices within the six months, it must be equivalent, for all practical purposes, to giving notice that the claim will be filed. *Butterfield v. State of New York*, 292.

3. *Place of trial — action for false imprisonment arising in county outside of city of second class, where arrest made by city police officer — Second Class Cities Law, section 242, construed — said section does not contemplate repeal of section 983 of Code of Civil Procedure — constitutional law — right of trial in own county.* Where a police officer of a city of the second class served a warrant in a bastardy proceeding in another county, and was sued in said county for false imprisonment, the place of trial is governed by subdivision 2 of section 983 of the Code of Civil Procedure, and is not changed by the provisions of section 242 of the Second Class Cities Law so as to entitle said police officer to change the place of trial to his own county. This because (1) he was not acting as a policeman of the city in executing the warrant, and (2) the Second Class Cities Law did not contemplate a repeal of the provisions of the Code of Civil Procedure.

Section 1 of article 1 of the State Constitution would seem to guarantee the plaintiff in the action for false imprisonment the right of trial in his

PRACTICE — *Continued.*

own county, which privilege belongs under the provisions of section 983 of the Code of Civil Procedure to citizens generally. *Lawton v. Farrell*, 376.

4. *Trial — venue — action between non-residents — when venue will be changed from rural to metropolitan county.* The rule that the court will not change a place of trial to promote the ends of justice from a rural to a metropolitan county does not obtain where neither of the parties is a resident of this State and where although the venue has been laid in a rural county, as a matter of fact both parties and their attorneys and most of the witnesses reside in the county of New York. The venue will be changed to the latter county where it will serve the convenience of witnesses, bring the trial to the county where the transaction took place and there will be no substantial delay because of the condition of the calendar, so that the ends of justice will be promoted. *Broderick v. de Mesa*, 669.

Appeal from order dismissing complaint.

See APPEAL.

Validity of stipulation in judgment disposing of lands in forest preserve.

See CONSTITUTIONAL LAW.

Reference of claim against estate.

See DECEDENT'S ESTATE, 2.

Attorney's lien on proceeds of judgment — reference.

See LIEN, 2.

Judgment in prior action as bar.

See MASTER AND SERVANT, 5.

Refusal to obey subpoena *duces tecum*.

See NEW YORK CITY, 3.

Loss of goods in transit — allegations on contract and in tort — waiver of tort.

See PLEADING, 2.

Service of summons on foreign corporation.

See PROCESS.

See NEW TRIAL.

[For table containing all sections of the Code of Civil Procedure cited and construed in this volume, see *ante*, p. lxxv.]

PRINCIPAL AND AGENT.

1. *Action for commissions for procuring orders for goods to be manufactured and installed by defendant — pleading — variance — evidence — amendment of complaint — appeal — when question sought to be raised not insisted upon at trial.* In an action to recover for commissions on contracts for bronze work to be manufactured and installed by the defendant, the plaintiff alleged a verbal agreement by which he was to receive commissions on all orders procured by him, and this allegation was supported by his testimony. He was also permitted, without objection, to give evidence as to a special contract by which he was to be compensated for the procuring of orders in a specified territory, even though he was not the procuring cause, and no motion was made to amend the complaint to entitle him to recover on such a theory until the close of the entire case, but counsel for the defendant when entering upon the defense stated that defendant was prepared to meet the cause of action alleged and would object to testimony tending to support a cause of action on any other theory, and moved to strike out the evidence as to the special contract on the ground that it constituted a radical variance from the complaint. The court ruled that if the specific objection had been taken on the motion to dismiss at the close of the plaintiff's case, an amendment of the complaint would have been allowed, and that it would not constitute such a substantial variance as to defeat the action. At the close of the evidence the defendant renewed its motion for a dismissal, whereupon the plaintiff was allowed to amend by alleging,

PRINCIPAL AND AGENT — Continued.

among other things, that the agreement was that he was not only to receive commissions on orders procured by him, but also on orders to the procurement of which he contributed in services, whether or not his services were the procuring cause.

Held, that the order granting the amendment should be reversed;

That, under the circumstances, the complaint should not be dismissed, but a new trial should be granted and an opportunity afforded the plaintiff to apply at Special Term for an appropriate amendment.

Since the plaintiff was only entitled to receive commissions on contracts for bronze work manufactured by the defendant, it was error to allow commissions on the gross amount of a contract including fixtures manufactured by another.

It was error for the court to exclude evidence offered by the defendant to show not only that the plaintiff was not the procuring cause of a certain contract, but that it obtained the same through the efforts of others in no manner contributed to by the services of the plaintiff.

The verdict of the jury awarding commissions on certain specified contracts was against the weight of the evidence.

Although the defendant objected that the action was prematurely brought in so far as it related to commissions on a certain contract claimed not to have been formally executed until after the commencement of the action, such question is not before the court on appeal, since no further question was raised with respect to the matter, either by a motion to strike out or a request to charge, and since the plaintiff's right to recover on said contract was submitted to the jury without objection or exception and without reference to the fact as to whether or not the commissions were earned prior to the commencement of the action. *Naulty v. Gorham Manufacturing Co.*, 36.

2. *Authority under power of attorney to guarantee payment of notes — indorsement binding on principal.* Where an attorney in fact, authorized to guarantee the payment of promissory notes, obligations and debts of any company in which his principal may be or become a stockholder, indorses a note of a company of which his principal was a stockholder before delivery to the payee, for the purpose of lending credit thereto, such indorsement amounts in legal effect to a guaranty of payment, conditioned on presentation, dishonor and notice, and is binding on the principal.

Such indorsement has no legal effect beyond that authorized in the power of attorney, i. e., to bind the principal to pay if the maker does not.

Such power of attorney would not authorize an indorsement passing title and shutting off defenses under the Negotiable Instruments Law. *Brooklyn Bank v. Metropolitan Trust Co.*, 225.

3. *Liability of wife for labor and materials in improving her land — agency of husband — promise of payment — Statute of Limitations — payments on running account — setoff.* Where, in an action by a landscape gardener for labor and materials furnished to the defendant, it appears that she requested and used the labor and materials and that her husband acted as her agent, the undenied testimony of the plaintiff that the defendant, when asked for payment, answered that "she was cramped at that time, but she would pay me when she could," sufficiently made out a promise of payment.

The rule that the marital relation alone does not empower the husband to involve the wife by his improvements on her land is not applicable in view of the proof of defendant's express ratification and also of her own orders to plaintiff and her acts of superintendence.

Nor was she released from liability by plaintiff's sending bills to the husband.

The Statute of Limitations is not a bar because of payments made on the running account.

A credit of a certain amount on a statement to the defendant's husband was a proper setoff in view of the findings of agency. *Vetault v. Kennedy*, 228.

4. *Suit for an accounting — evidence — proof of oral contract of agency following prior written contract.* Where in an action by a principal against his agent to recover moneys alleged to have been received in a fiduciary

PRINCIPAL AND AGENT — *Continued.*

capacity and converted by the agent, the latter offered in evidence a written contract which, while governing his right to sell certain motion picture films manufactured by the plaintiff and fixing his commissions, referred only to two specific films completed by the plaintiff at the time of the contract, and it is admitted that the defendant has accounted for the two films sold under said written contract, it was error for the court to exclude evidence by the plaintiff of a subsequent parol agreement giving to the defendant the right to sell the plaintiff's future productions upon the theory that the parol agreement was merged in the writing. The written contract, with respect to picture films on hand at the date thereof, did not preclude the plaintiff from proving the verbal contract with respect to its future productions, as to which it asks an accounting by the agent. *Frohman Amusement Corporation v. Blinkhorn*, 431.

5. *Sale of milker outfit* — adoption and confirmation of statements made by agent. A person who accepts the benefit of a contract cannot be heard upon the trial of an action brought to charge the other party thereto with liability thereunder to question the authority of the agent who made the contract in his behalf.

Hence, where in an action to recover the balance claimed to be due on account of the sale and delivery by the plaintiff to the defendant of a milker outfit, it appears that when the plaintiff first called upon the defendant in respect to the sale, he brought a salesman for the manufacturer, and stated to the defendant that he had brought him there to talk "machine" to him, and that all of the representations and statements were thereafter made by said salesman, the plaintiff, by asserting his claim, adopted and confirmed all that the salesman said and did in inducing the sale. *Finkle v. Lasher*, 471.

6. *Pleading — sufficiency of complaint in action by real estate broker against another broker for commissions* — equitable claim upon quasi or constructive contract. A complaint which, in effect, alleged that the plaintiff, a real estate broker, was employed by the owners of realty to effect a sale thereof upon agreement for five per cent commission; that he listed the property for sale with the defendant, another real estate broker, under an agreement to allow him two and one-half per cent of the commission for effecting a sale, and that the latter broker procured a purchaser and upon notifying the owners received the five per cent commission, states a claim in equity upon a quasi or constructive contract for the two and one-half per cent commission. *Gerard v. Cross & Brown Co.*, 612.

PRINCIPAL AND SURETY.

See GUARANTY AND SURETYSHIP.

PROCESS.

Service of summons in this State on managing agent of foreign corporation — failure to use diligent efforts to serve officers. Where a foreign corporation, although not authorized to transact business in this State and not having designated a person upon whom service of process can be made, has an office in the city of New York where a sales manager transacts a continuous and permanent course of business, employing several agents to solicit and forward orders to it, which are filled from its plant in the foreign State, a summons in an action for services alleged to have been rendered may be served upon said sales manager as a "managing agent;" but said service is invalid where it appears that the plaintiff made no prior effort personally to serve in this State any of defendant's officers mentioned in subdivision 1 of section 432 of the Code of Civil Procedure.

Service of a summons upon the managing agent of a foreign corporation in this State can only be resorted to and made effectual as the commencement of an action against the corporation, in a court of this State, after diligent efforts to obtain personal service upon one of such officers therein has been made and failed. *Swift v. Matthews Engineering Co.*, 201.

See EXECUTION.

PROVISIONAL REMEDIES.

See ARREST.

See ATTACHMENT.

PUBLIC HEALTH.

*Foods — Agricultural Law, sections 200 and 201 — compound sold under name "Vanilla Flavor" — formula of compound printed in small type. A defendant who sold under the name "Vanilla Flavor" a compound or mixture of which only a small part was extract of vanilla may be convicted of a violation of sections 200 and 201 of the Agricultural Law, although the formula was printed on the label with the word "compound," if the type was so small as not to attract the notice of purchasers except upon a close inspection. It was error to rule as a matter of law that the defendant had not violated the statute. *People v. Treichler*, 718.*

Sanitary Code — proprietary medicines — registered ingredients — trade secrets.

See NEW YORK CITY, 6.

PUBLIC OFFICER.

1. *Vacancies — when term of sheriff chosen at special election commences to run — mandamus — term "on or about" defined. The term of a sheriff chosen at a special election to fill a vacancy commences to run from the date of his election, notwithstanding the provision of section 180 of the County Law that there shall continue "To be elected in each of the counties a sheriff, * * * four coroners, * * * who shall respectively hold their offices for three years from and including the first day of January, succeeding their election."*

Said provision of the County Law does not refer to an officer chosen to fill a vacancy, whether at a special or general election, but to the term of an officer chosen in regular course at a general election in November. It contemplates the beginning of the political year as prescribed by section 6 of article 10 of the Constitution.

The paramount aim of the Constitution and the statutes is to secure the filling of vacancies in elective offices by election at as early a day as is practicable.

Hence, where an under sheriff was chosen sheriff at a special election on January twenty-third, received his certificate on or about January thirtieth, and on February sixth swore to his oath of office, which was filed on February seventh, the day after his undertaking was officially received, and, in an application for a peremptory writ of mandamus to compel the audit of the payroll for his salary as under sheriff and acting sheriff, alleged in his affidavit that "on or about the fifth day of February, 1917, your petitioner, as acting sheriff of said county of Queens, duly certified the payroll," an order denying said writ should be affirmed as his affidavit is not sufficient to establish that he certified the payroll on February fifth so as to exclude February sixth, when he took the official oath and his bond was received, or February seventh, when the oath was filed.

The term "on or about" is with regard to time a relative term sufficiently definite in certain connections but rendering the statement which it modifies insufficient for purposes to which definite accuracy is requisite. *Matter of Mitchell v. Prendergast*, 690.

2. *Removal of county officer by Governor — costs of defense — County Law, section 240, construed. The provisions of section 240 of the County Law making the reasonable cost and expense in proceedings before the Governor for the removal of a county officer upon charges a county charge only applies where the county officer has made a successful defense to the charges against him.*

Where the proceeding results in the removal of a county officer by the Governor for official misconduct, he is not entitled to charge the costs of his defense against the county. *People ex rel. Moss v. Board of Supervisors*, 716.

Authority of board of health of city to enlarge its own powers.

See NEW ROCHELLE, CITY OF.

PUBLIC SERVICE COMMISSION.

Public service corporations — application by gas corporation for leave to issue and sell bonds for reimbursement of moneys expended from income — authority of Public Service Commission to dictate as to how money in treasury of corporation shall be disbursed. Where, on an application by a gas corporation, under section 69 of the Public Service Commissions Law, for

PUBLIC SERVICE COMMISSION — *Continued.*

leave to issue and sell bonds to the amount of \$134,545.43 "for reimbursement of moneys expended from income or such other moneys in the treasury for the construction, completion, extension or improvement of its facilities, plant or distributing system," it appears that under the rate for depreciation adopted by the corporation the sum of \$48,209.16, claimed to have been expended from income for additions and improvements, was really expended out of the depreciation fund, an order of the Commission providing that such moneys "when so reimbursed to be used only to make good depreciation in the property of the company" should be modified by providing that out of \$134,545.43 allowed for reimbursements of moneys expended from income the sum of \$48,209.16 be used only to make good the said amount expended out of the depreciation reserve, or that, in the alternative, the total amount of bonds authorized for reimbursements be reduced by said amount.

The Public Service Commission has no authority to dictate as to how money in the treasury of a public service corporation shall be disbursed. If a corporation is actually entitled to issue bonds the Commission has no power to affix as a condition some act that it has no jurisdiction to compel; but it has power in an order granting consent to impose a condition based upon facts which justify the order with the condition. *People ex rel. Kings County Lighting Co. v. Straus*, 840.

Natural gas company — laying pipes in country. *People ex rel. Pavilion Natural Gas Co. v. Public Service Commission*, 937.

RAILROAD.

1. *Negligence* — *pleading* — *denial of plaintiff's allegation that injuries were caused on the defendant's railroad* — *burden of proof as to incorporation.* Where a defendant railroad company sued for personal injuries makes a general denial to the plaintiff's allegation that it is a domestic corporation "engaged in the operation of an elevated railroad from Manhattan to Coney Island, in the city of Brooklyn, New York, for the carriage of passengers," the plaintiff having been injured in the borough of Brooklyn, a judgment in her favor will be reversed where the evidence does not show any relation of the defendant to the railroad line on which the plaintiff was injured, and it does on the contrary indicate that another railroad company was operating the line.

The denial of the defendant did not require the plaintiff to prove that it was a corporation, as the defendant did not affirmatively allege that it was not incorporated, but it did cast upon the plaintiff the burden of showing that the defendant was operating the railroad on which she was injured. *Lynett v. Sea Beach Railway Co.*, 112.

2. *Negligence* — *death of station agent struck by fast passenger train while attempting to cross tracks* — *evidence* — *contributory negligence* — *duty of railroad company to give warning of approach of trains* — *peculiar whistle or signal denoting character of train not required.* In an action for the death of a former station agent familiar with the difference between the warning whistles of fast through trains and of locals, it appeared that the decedent seeing the approach of a fast through passenger train running at the rate of sixty miles an hour upon the schedule time of a slow local passenger train, and whistling as it approached in a manner peculiar to the latter train, attempted to cross the tracks before said train, when it was so near the station that it could not be stopped in time.

Evidence examined, and *held*, insufficient to establish the negligence of the defendant and that the decedent had been guilty of contributory negligence.

A railroad company is not required to give a peculiar warning whistle or signal to apprise the public as to the character of approaching trains. It is enough if it gives a sufficient and timely warning of their approach. *Ellers v. Erie Railroad Co.*, 298.

3. *Negligence* — *injury to motorcyclist at grade crossing* — *evidence not justifying recovery* — *contributory negligence.* Action to recover damage for personal injuries sustained by the plaintiff who, while riding a motorcycle across a railroad crossing, was struck by the defendant's train. The plaintiff had previously ridden over this crossing and was familiar with the locality; he did not reduce the speed of his machine which was moving

RAILROAD — Continued.

approximately ten miles an hour until he was within eight or ten feet of the track upon which the train, a fast express, was approaching and at a time when it was only from fifty to seventy-five feet away. There was a great preponderance of evidence to the effect that the train gave warning by bell and whistle as it approached the crossing. On all the evidence, *held*, that a judgment for the plaintiff should be reversed in that no negligence upon the part of the railroad company was established and because the plaintiff was guilty of contributory negligence as a matter of law, and that the defendant's motion for a direction of a verdict should have been granted. *Bowden v. Lehigh Valley Railroad Co.*, 413.

4. *Motor vehicles — passenger alighting and passing behind car struck and killed by automobile truck — municipal ordinance — contributory negligence — ownership of truck — questions for jury.* In an action for death caused by an automobile truck it appeared that the deceased, after alighting from a street car, passed behind the same and when a foot from the car track looked through the rear fender, which somewhat obstructed her view, and could see no vehicle at a distance of eighty feet; that the truck without stopping and without warning struck and killed the deceased while she was within eight feet of the street car, and that an automobile ordinance prevented such a vehicle from passing or approaching within eight feet of the street car so long as the same remained standing for the purpose of discharging or taking on passengers.

Held, on all the evidence, that an issue of contributory negligence was presented for the jury, and that it was error to set aside a verdict for the plaintiff.

As the automobile truck bore the name of one of the defendants and was its property, being at the time loaded with its goods, it could not insist as a matter of law that the formal lease of the same to another and other contracts relieved it from liability. *Lorenzo v. Manhattan Steam Bakery, Inc.*, 706.

5. *Motor vehicles — injury to intending passenger struck by automobile while within eight feet of car — municipal ordinance — contributory negligence — due care by plaintiff in guarding against injury — presumption that driver of automobile will obey ordinance.* In an action for personal injuries it appeared that the plaintiff left the sidewalk with the intention of boarding a street car which had stopped for the purpose of taking on passengers, and that when within eight feet of the car was run down by defendant's automobile, which was passing the car in violation of a municipal ordinance.

Held, on all the evidence, that the plaintiff exercised due care in guarding against injury from the defendant's car entering the prohibited zone.

The plaintiff was bound to exercise such care only as was commensurate with the danger.

The plaintiff had the right, in a measure at least, to rely on the presumption that the driver of the automobile would obey the law and not enter the prohibited zone within eight feet of the street car.

Moreover, if the plaintiff had seen the approaching car she could still have relied on the presumption that it was slowing down with the intention of stopping in obedience to the law. *Crombie v. O'Brien*, 807.

Negligence — fall on stair. *Wichman v. New York Consolidated R. R. Co.*, 922.

Review of assessment — right of another company to intervene.
See TAX, 1.

REAL PROPERTY.

1. *Waters and watercourses — presumption of title to lands below high-water line — eviction by paramount title — action for breach of warranty — damages.* The title to lands wholly below the high-water line is presumptively in the State.

Where the Legislature has granted lands below the high-water line to a village, which has laid out across the same a street, a person claiming title thereto is evicted and is entitled to damages for breach of a covenant of warranty.

The expense of defending or attempting to uphold letters patent of lands under water, adjacent to lands conveyed by defendant to the plaintiff,

REAL PROPERTY — *Continued.*

cannot be recovered as damages in an action for breach of covenant of warranty. *Baker v. Johnson*, 230.

2. *Action for breach of covenant of deed — evidence — when conversations between parties inadmissible.* In an action for the breach of covenant of a deed from defendant to plaintiff, the latter must stand on the deed itself.

In construing the plaintiff's deed, all other deeds to which it refers and which refer to each other are required to be considered.

Where in such an action there is no uncertainty or ambiguity as to the land actually conveyed, conversations and negotiations between the parties are inadmissible in evidence. *Riegel v. Larnard*, 355.

3. *Covenant to erect building construed — when covenant does not run with land and is not enforceable by other grantees — use of residence by physician as private maternity hospital.* A covenant whereby a grantee, for himself, his heirs and assigns, agreed with the grantor that within two years from the date of the deed he would cause to be erected and fully completed upon the lands a first class building adapted for, and which shall be used only as, a private residence for one family, and which shall conform to certain plans, is not a restrictive covenant running with the land, and hence is not enforceable by another grantee holding under a deed from the same grantor containing a similar covenant. Such covenant is a personal agreement with the grantor to erect a building for a particular use within a specified period, and did not continue binding upon subsequent purchasers until the erection of the building.

But a grantee of lands on which a building had been erected in compliance with said covenant has a standing in court to enforce the covenant, if binding, against another grantee, although she owns other lands purchased from the same grantor on which such building has not been erected as required by the covenant.

A restrictive agreement or covenant with respect to the use of demised premises is to be construed most favorably to the grantee.

In any event, a case for the equitable enforcement of the aforesaid covenant has not been made out where a building in compliance therewith was actually erected on the lands now held by the defendant, for there was no limitation of time during which the building was to be used as a private residence, and hence the building might have been demolished and another erected and used for other purposes.

Moreover, there is no violation of the covenant where the defendant, a physician, uses the building as a private residence and in addition merely lodges and treats maternity patients, and indicates such professional business by an inconspicuous sign. *Booth v. Knipe*, 423.

4. *Water and water rights — easements of riparian owners in lands in the city of New York formerly under water — action of ejectment — respective rights of sovereign and riparian owners — grant of sovereign rights to city of New York — rights of city to said lands under water similar to those of State — city may not appropriate easements of riparian owners except by eminent domain — effect of construction of wharves by riparian owners under municipal permit — when such construction no basis for title by adverse possession — ejectment does not lie where parties have mutual rights in same premises.* Prior to the enactment of chapter 285 of the Laws of 1852 an owner of uplands abutting upon the Harlem river between the present One Hundred and Sixth and One Hundred and Seventh streets in the city of New York had an easement in the adjacent lands under water of passage to and fro to land boats and merchandise, and for that purpose to construct docks or piers thereon. The State held the title in fee to the lands under water subject to this easement, but vested with the power in its governmental capacity to improve the waters for the purpose of navigation to the detriment of the rights of the upland owner, for the reason that there are certain rights of navigation and commerce by water which are common to all.

When by the enactment of the statute aforesaid the people of the State granted its rights in said lands under water to the city of New York and authorized the establishment of Exterior street, so called (a street not yet completed), but reserved to upland proprietors a pre-emptive right to all grants which might be made by the State of said lands under water, the city as grantee of the State and vested with the fee held the lands in

REAL PROPERTY — *Continued.*

trust for the public for the promotion of commerce and general welfare, subject, however, to the easements of riparian owners. The permission to lay out Exterior street did not give to the city the right to take without compensation the easements of riparian proprietors as this would be beyond the constitutional power of the Legislature.

When the city of New York under legislative authority established the bulkhead line of the Harlem river, as shown upon the Southard map, and subsequently in 1865 granted in fee to McCaddin, the owner of uplands between the present One Hundred and Sixth and One Hundred and Seventh streets, lands under the waters of the Harlem river in front of his uplands upon the condition that the grantee, or his heirs and assigns, should construct good and sufficient bulkheads on the established line and fill in behind the same at his own cost and expense and keep in repair such streets and avenues as were then or might thereafter be laid out through said premises, which deed expressly provided that the use of the names One Hundred and Sixth and One Hundred and Seventh streets and other avenues was solely for the purpose of description and that the grantor reserved said streets to itself, the fee of the lands formerly under water between Exterior street and Avenue A remained in the city.

But, even though the city of New York retains the fee in said lands, it does not follow that it is entitled to a judgment of ejectment as against the successors of McCaddin holding under meane conveyances from him, for as riparian owners they have easements in the lands formerly under water to the limit of the bulkhead line and they and their predecessors had a right to construct such docks and bulkheads as were necessary to the enjoyment of such easements of which they could only be deprived by an exercise of eminent domain for a public purpose upon the payment of compensation.

Hence, where there is no claim that the present owners or their predecessors in title have in any way failed to perform the covenants in the grant by the city to them and their easements have not been taken by eminent domain, they cannot be ejected from the lands formerly under water merely because the city is the owner of the fee thereof, for such ownership is in trust merely and can only be exercised in the interest of the public and in the execution of the trust, especially so where the grant by the city was made upon the payment of a valuable consideration.

However, when the Legislature by chapter 105 of the Laws of 1868 authorized the abandonment of Exterior street for the uses designated in the act of 1857, and under the authority of said former statute the city of New York gave permission to the proprietors of water grants to erect piers and wharves within the bulkhead line, and a grantee of said McCaddin, pursuant to municipal permission, actually constructed such wharves, his successors are not entitled to succeed in an action of ejectment against the city of New York upon the theory that they have acquired title to the lands formerly under water by adverse possession. This, because the erection of such wharves was not an assertion of a hostile claim of title to the premises, for the grantees remained in possession under a known title derived from the city by the grant to McCaddin.

A title by adverse possession only arises from long-continued use or possession when a man can show no other title or right of possession, the law implying a grant from the fact of a continued use or possession without objection. If other title or right of possession can be shown no right in the premises adverse to that right or title will be implied from possession. The possession or use will be held to be under the known title.

Thus, the mere statement of an unfounded claim by one in lawful possession cannot change the character of his possession nor impose any obligation on the other party to alter his position in relation thereto.

As both of the parties to this action have rights in the property which they may continue to hold and enjoy, neither is in a position to eject the other therefrom. *Burns Bros. v. City of New York*, 615.

5. *Grant to one where consideration paid by another — moral obligation of grantee to reconvey limited by duty to make good loss suffered by tenants through negligence — transfer with intent to defraud judgment creditor.* Where the purchaser of apartment houses paid the consideration and took title in the name of his cousin, who was his housekeeper and who paid no consideration, but agreed to manage the property, and, after paying to the purchaser

REAL PROPERTY — *Continued.*

a certain amount of the rents, retained the balance, and the said cousin, after the commencement of an action against her for injuries caused by her negligence as owner and landlord, reconveyed the premises to the purchaser, the only consideration being a moral obligation, said transfer should be set aside on the ground that it was made with intent to defraud the judgment creditor.

The moral obligation of the owner of the title to reconvey was limited by her duty to make good the loss suffered by tenants through her fault as landlord while she held title. *Hegstad v. Wysiecki*, 733.

6. *Restrictive covenant construed — when small retail stores not dangerous, noxious or offensive to neighboring inhabitants — injunction.* A restrictive covenant, which provides that neither the purchaser nor her heirs or assigns will ever permit to "be erected or carried on or established in any manner whatever any slaughter house, tallow chandlery, smith shop, furnace foundry, nail or other factory or any manufactory for making starch, glue, varnish, vitriol, oil or gas or for tanning, dressing, repairing or keeping skins, hides or leather, or any distillery, brewery or sugar bakery, lime kiln, coal yard, railway or other stable or depot or car house or any manufactory, trade, business or calling, which may be in anywise dangerous, noxious or offensive to the neighboring inhabitants," does not prohibit the construction of several small retail stores with dwelling apartments above, upon the ground that they are "noxious or offensive" so as to warrant the court in enjoining their completion.

The meaning of such a covenant is a question of law and no business is "dangerous, noxious or offensive" unless it is so in the same manner that the prohibited trades are. *Moubray v. G. & M. Improvement Co.*, 737.

When assignee of devisee entitled to proceeds of realty taken by eminent domain.

See ASSIGNMENT.

Validity of stipulation in judgment disposing of lands in forest preserve.

See CONSTITUTIONAL LAW.

Liability of contractor in constructing subway for interfering with easements of light, air and access.

See DAMAGES.

Descent — evidence insufficient to establish source of title.

See DECEDENT'S ESTATE, 5.

Alleged forgery of signature on deed — when ejectment may be maintained.

See EJECTMENT.

Elimination of grade crossing — right of adjoining owner to damages.

See EMINENT DOMAIN, 1.

Failure to provide lateral support when excavating — liability of land-owner.

See NEGLIGENCE, 9.

Liability of owner for injuries resulting from failure to protect foundation exposed by excavation.

See NEGLIGENCE, 10.

Erection of elevated viaduct — right of abutting owner to damages.

See NEW YORK CITY, 4.

Sale of land by one person to satisfy debt of another.

See TAX, 5.

Specific performance of contract to convey lands.

See VENDOR AND PURCHASER.

See LANDLORD AND TENANT.

RECEIVER.

Receivership clause in mortgage — when binding on tenant.

See MORTGAGE, 1.

When owner of secondary rights in mortgage not entitled to foreclose,

See MORTGAGE, 3.

REFERENCE.

Claim against estate — practice.

See DECEDENT'S ESTATE, 2.

Attorney's lien on proceeds of judgment.

See LIEN, 2.

REPLEVIN.

When defendant in possession of property cannot justify under title of stranger — Code of Civil Procedure, section 1723, as to answer of title not applicable to actions before justice of the peace — evidence insufficient to connect defendant with alleged right of prior plaintiff in property. In an action of trespass, trover or replevin, a defendant cannot justify under the title of a stranger without connecting himself with the right of said person. The reason is that possession is *prima facie* evidence of right and conclusive against all the world except the true owner or one connecting his title with him.

This rule was not changed by section 1723 of the Code of Civil Procedure providing that a defendant may by answer defend on the ground that a third person was entitled to the chattel without connecting himself with the latter's title.

Said section is not applicable to actions to recover a chattel brought before a justice of the peace.

In an action of replevin to recover possession of sheep or the value thereof, it appeared that they were taken by a constable from the possession of the plaintiff in an action brought before a justice of the peace to recover the same, in which the plaintiff herein was defendant; that they were delivered by the constable to the defendant herein who has since kept and refused to deliver them to the plaintiff; that at the opening of the trial in the prior action, the requisition was set aside for a defect in the undertaking, and the attorney for the defendant then said that they would try the suit as if there had been no replevin and that the sheep would be left where they were until after the decision, but said proposition was not accepted by the plaintiff. The justice heard and determined the action in favor of the plaintiff therein, and the only allegation in the answer tending to connect the defendant with the alleged title of the plaintiff in the prior action was that the sheep are the property of said defendant.

Evidence examined, and *held*, insufficient to connect the defendant with any right the plaintiff in the prior action may have had in the property; that the defendant was a mere bailee of the constable who was a wrongdoer and had no right to the possession of the property as against the plaintiff. *Bills v. Baker*, 480.

REVISED STATUTES.

See STATUTES.

ROAD.

See HIGHWAY.

ROBBERY.

First degree — evidence.

See CRIME, 2.

RULES.

[For table of General Rules of Practice cited and construed in this volume, see *ante*, p. lxvii.]

SALE.

1. *Action for goods sold and delivered upon sample — oral stipulation between parties for examination by experts of samples and making their report final — summary enforcement of stipulation — order of court not conforming to stipulation modified.* Where, in an action to recover the purchase price of several barrels of paste sold and delivered by plaintiff upon sample, the sole question presented is whether the paste delivered is equal in quality to the sample and the parties during the trial of this issue enter into an oral agreement in open court, with the consent and approval of the presiding justice, whereby each side is to select an expert chemist for the purpose of examining the paste, and the result of such examination is to be submitted to the parties through their respective attorneys and accepted if the experts agree, and if

SALE — Continued.

they do not agree a third expert is to be selected, and the report of the majority taken as final, such agreement is binding upon the parties and concludes the court whose duty it is as between the parties to enforce and effectuate it.

Such agreement being undisputed and proper, may be summarily enforced by motion.

Although oral, it is just as obligatory, conclusive and enforceable as though it had been reduced to writing and executed with every legal formality.

But the agreement enforced must be, in all its material details, that which the parties entered into, the court being without power or authority to modify, alter or change the same in any material detail against the objection of one of the parties.

Provisions of an order purporting to carry out said agreement examined, and held, not to conform thereto and not to be specific enough to fully guard and protect the rights of the parties because, *first*, it does not obligate them to accept as final the result of the tests of the two experts, if they agree, or make the report of a majority if a third one be selected, final and binding; *second*, it leaves the method of properly preparing the contents of the barrels for testing indefinite; *third*, it does not provide for notice of the time when the samples shall be taken or that both experts shall be present; *fourth*, it does not provide the place of deposit or custodian of the third set of samples during the time tests are being made by the two experts selected; *fifth*, it makes no provision for the appointment of the third expert should such appointment become necessary. *Randall & Sons, Inc., v. Garfield Worsted Mills, 196.*

2. *Intent that payment and delivery be concurrent acts — agreement to resell merchandise — conversion.* Where the purchaser of a stock of shoes, rubbers, etc., agreed to place them on sale in the store of the vendor, to pay the clerk hire and advertising expense thereof, and that the vendor should be at liberty to participate in such sale and should have the proceeds thereof from day to day until the purchase price was paid, and the vendor after receiving the greater part of the purchase price due him removed the remainder of the stock, valued at nearly four times the balance due, and excluded the purchaser from the possession thereof, the latter is not entitled to maintain an action for conversion, because title had not vested in him, the intent being that delivery and payment should be concurrent. *The rights of the parties rested in contract. Groves v. Warren, 333.*

3. *Breach of warranty as to quality of goods — counterclaim founded upon breach of warranty — Personal Property Law construed — notice to seller.* Where in an action to recover the full contract price of canned foods sold and delivered to the defendant the court finds as a fact a breach of warranty as to the quality of the goods, which breach is set up as a counterclaim by the defendant, it was error for the court to allow a full recovery by the plaintiff upon the theory that the counterclaim for breach of warranty is ineffective because the defendant kept and used the goods after knowledge of the breach. This, because under the Personal Property Law, as amended, the defendant on discovering the breach of warranty may retain and use the goods and recoup her damages out of the purchase price, provided she gave notice to the plaintiff of the breach of warranty within a reasonable time after its discovery by her.

Where it appears that at the time of the delivery of the goods the defendant did not know the plaintiff's name or address, a notice of breach of warranty given three weeks later when the plaintiff called to collect the price was given within a reasonable time. *Martin v. Boland, 421.*

4. *Delivery of goods after time set therefor — waiver of time limit set for performance — subsequent refusal of vendor to deliver balance of goods.* Although goods to be delivered under a written contract of sale were, by the terms of the contract, to be taken by the vendee within six months, where as a matter of fact the time limit was not insisted upon by either party and the vendor, after the expiration thereof, delivered installments of the goods which were accepted by the vendee, there was a waiver of the time limit, and the vendor when sued for a subsequent refusal to complete the contract cannot escape liability for the breach on the theory that it was at liberty to repudiate the contract at any time subsequent

SALE — Continued.

to the expiration of the six months' period and to demand a higher price for the balance of the goods.

Where the continuance of the performance of a contract is permitted after the expiration of the period of performance, the party who might have elected to insist upon the performance within the time agreed upon is deemed to have waived the time for performance and if he thereafter desires to limit the time for performance it is incumbent upon him to give notice requiring performance within a reasonable time. Such rule is binding equally upon vendor and vendee. *Schulder v. Ladew Co., Inc.*, 458.

5. *Conditional sale — failure to file — title of conditional vendor as against third party in possession — bankruptcy — title of trustee in bankruptcy of vendee — discharge — provability and release of claim for conversion.* The failure to file a conditional contract of sale does not, as between the parties, affect the validity of the vendor's title.

Where the conditional vendee of a silo placed it upon lands owned by his wife, where it was cemented to a concrete base and connected to the barn, but in such a manner that it could be detached and removed without causing any serious damage to the realty, and she failed to establish that she was a purchaser in good faith and that she had no knowledge of the condition of the contract, and had parted with value or lost some right on account of the annexation of the silo to her premises, the title remained in the conditional vendor as against her.

Where, after the annexation of the silo to the realty, the vendee was adjudicated a bankrupt, his trustee acquired no lien on the property and could not impeach the validity of the contract for failure to file the same.

The filing of the petition in bankruptcy did not bring into existence a claim in favor of the conditional vendor against the vendee and his wife for a conversion, and where such liability did not arise or become fixed until a demand and refusal for the property, made three months after the petition was filed, a claim therefor was not provable in bankruptcy and was not released by the discharge. *Creamery Package Manufacturing Co. v. Horton*, 467.

6. *Pleading — goods sold and delivered — answer — allegations insufficient to constitute counterclaim or valid defense.* Where a defendant sued for goods sold and delivered alleges as a defense that the goods ordered were represented by the plaintiff to be first class in every respect and extra good value for the price quoted, when as a matter of fact they were not first class or extra good value, but were inferior and of less value than the price charged, the plaintiff is entitled to judgment on the pleadings under section 547 of the Code of Civil Procedure. This because the denial does not put in issue any material allegations of the complaint and does not constitute an offset or counterclaim, not being pleaded as such. *Katz Underwear Co. v. Burns*, 487.

Acceptance of goods sold — accord and satisfaction.

See CONTRACT, 10.

Adoption and confirmation of statements made by sales agent.

See PRINCIPAL AND AGENT, 5.

Optional agreement to pay usury.

See USURY.

SEPARATION.

Effect of former judgment of limited separation.

See HUSBAND AND WIFE, 6.

SESSION LAWS.

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lxii.]

SHIPS AND SHIPPING.

Distinction between liability of wharfinger for merchandise and where he rents wharfage privilege — when wharfinger not liable for theft of motor boat — evidence — custom of other wharfingers. The liability of a wharfinger *quoad* merchandise, a familiar kind of bailment, is quite different from the liability of a wharfinger charging "wharfage," which latter is like rent — a compensation for the use and occupation of a pier or bulkhead.

SHIPS AND SHIPPING — Continued.

Thus, the owner of a marine dock or basin is not liable for the theft of a motor boat where the owner merely rented the privilege of mooring the craft in the basin and fastened it with a padlock of which he kept the key and where he was accustomed to take the boat from the basin whenever he desired without notifying the defendant of his departure or return, especially so where the complaint merely alleges a demand and refusal after the launch had been stolen, and does not plead any fault or negligence of the defendant.

In such action defendant's proof of usage in other yacht basins was competent on the issue of an implied contract. *Blank v. Marine Basin Co., Inc.*, 666.

SPECIFIC PERFORMANCE.

Contract to convey land — regulation of use by municipal ordinance passed between date of contract and time for consummation.

See VENDOR AND PURCHASER.

STATUTES.

[For tables of the Session Laws and Statutes cited and construed in this volume, see *ante*, p. lviii *et seq.*]

STREET.

See HIGHWAY

SUPPLEMENTARY PROCEEDINGS.

Third party order — restraining disposition of property.

See EXECUTION.

SURROGATE.

Jurisdiction on probate of will — equitable jurisdiction — Code of Civil Procedure, sections 2510 and 2614, construed — effect of amendments of 1914 relating to Surrogates' Courts — effect of prior joint will — jurisdiction of surrogate to consider or act upon prior joint will or contract — duty of surrogate to admit last will to probate — jurisdiction to vacate or set aside decree — petition. It is the duty of a surrogate to admit to probate the will of a decedent last executed in point of time, if the testator was competent to make it, and it was executed in conformity with the requirements of the statute, and it is not within his power to pass upon the question of whether the decedent had the right to execute such will because of a previous agreement to the contrary. If such an agreement exists, that fact and its legal results can only be determined by the Supreme Court in a suit in equity, and the manner of determination is not to admit a former will to probate, although such former will is the result of a contract between the testator and a third party governing the testamentary disposition of their property, but to sustain the contract if established by clear and convincing testimony and supported by an adequate consideration and compel its performance by the heirs of the decedent or otherwise grant adequate relief. This rule has not been changed by section 2510 of the Code of Civil Procedure as amended in 1914.

The words "competent" and "restraint," as used in section 2614, providing that "If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid," have no reference to conditions caused by or arising from the prior execution of a joint will or contract, but refer and are limited to mental competency and restraint exercised upon a testator at the time of the preparation and execution of the will offered for probate.

The general phrases of section 2510 of the Code of Civil Procedure by which equitable jurisdiction is given to surrogates are limited to its exercise in cases (1) when the question acted upon is "necessary to be determined in order to make a full, equitable and complete disposition of the matter" being considered and upon which they are called to act in determining the presented questions; and (2) in the manner prescribed by statute.

Now, as before the enactment of section 2510, surrogates must admit to probate the last will of a decedent proven to their satisfaction to comply with the provisions and requirements of section 2614, and any contract for a different disposition of the property of the testator must, if enforceable,

SURROGATE — *Continued.*

be established in and enforced by a suit in equity in the Supreme Court against the heirs, devisees and legatees of the testator.

Hence, in a proceeding for the probate of a will, the surrogate has no jurisdiction to consider or act upon a prior joint will which had been revoked by express provisions in the later one sought to be probated.

The mere fact of the joint will having been executed does not constitute it an irrevocable contract restraining the decedent from executing another and later will, changing the disposition made of her estate.

So far as Surrogates' Courts are concerned, there are no irrevocable wills.

Subdivision 6 of section 2490 of the Code of Civil Procedure contains the only authority possessed by surrogates to open, vacate or set aside a decree granted and entered in their courts and to grant a new trial or hearing. The exercise of such power must be based upon the existence of fraud, newly-discovered evidence, clerical error "or other sufficient cause."

Petition to vacate and to set aside a decree admitting a will to probate *held* not to aver the existence of either of the grounds to which the power of the surrogate to act is limited, and not to excuse the petitioner's default. *Matter of Hermann*, 182.

TAX.

1. *Certiorari* — review of assessment of railroad company — right of another company alleged to be under-assessed to intervene — *Tax Law construed* — *Code of Civil Procedure construed*. Where, in a proceeding by a railroad company by *certiorari* to review its assessment on the ground that it is excessive compared with that of other property on the same roll, another railroad company, the only one upon the roll, is mentioned in the petition as being under-assessed and much of the evidence relates to such assessment and the property of such railroad is being considered item by item, the court may, in its discretion, under section 2137 of the Code of Civil Procedure, permit said company to intervene upon the ground that it is "specially and beneficially interested in upholding the determination to be reviewed."

But every party whose assessment is questioned upon such a proceeding should not be allowed to intervene.

The Code of Civil Procedure does not provide a new remedy of *certiorari*, but regulates the writ and the practice therein in cases where it is expressly authorized by statute or where the right to it existed at common law and has not been taken away by statute.

The Tax Law, sections 290-296, both inclusive, permitting a review of assessments by *certiorari*, is exclusive only in so far as it regulates the practice and the use of the writ in tax cases. *People ex rel. N. Y. C. R. R. Co. v. Block*, 251.

2. *Transfer tax* — mortgages and moneys owned by husband and wife as joint tenants — subdivision 7, section 220 of Tax Law, construed. Mortgages held by husband and wife "jointly and to the survivor of them" and also moneys, the proceeds of said mortgages, which have been deposited in a bank in the joint names of the husband and wife subject to withdrawal by the check of either, are, on the death of one of the joint tenants, subject to a transfer tax on the undivided half interest of the decedent, passing to the survivor.

Although subdivision 7 of section 220 of the Tax Law, as added by chapter 664 of the Laws of 1915, went into effect after said mortgages were executed, said statute applies on the taxation of the transfer, for the undivided half interest only passes upon the death of a cotenant, and hence the statute is not made retroactive. *Matter of Teller*, 450.

3. *When educational institution entitled to exemption* — discretionary power of trustees to pension teachers and officers. Where the charter of an educational corporation provides that its resources shall be devoted to educational work without right of pecuniary gain beyond reasonable compensation for services rendered, it is none the less entitled to exemption from taxation under the provisions of the Tax Law because the charter also provides that the board of trustees have discretionary power to make pensions or other merited allowances to teachers, officers or employees out of the surplus earnings.

Such discretionary power to make pensioning and other merited allowances does not offend the prohibition against making pecuniary profit.

TAX — *Continued.*

"Profits" means gain made from any business or investment when both receipts and payments are taken into account, and a pension being compensation as a reward for labor already done is essentially different from a "profit." *People ex rel. Masters School v. Keys*, 677.

4. *Transfer tax — money and mortgages held jointly by husband and wife — estates by entirety — constitutional law — Tax Law, section 220, subdivision 7, taxing vested estates by the entirety.* Where moneys on deposit and mortgages are held in the joint names of husband and wife only the half interest should be taxed under section 220 of the Tax Law upon the death of the husband.

Subdivision 7, section 220 of the Tax Law, as amended, authorizing the taxation of estates by the entirety which at the enactment of said statute had already vested, is constitutional.

A surviving tenant by the entirety in this State acquires an interest taxable under said provision of the Tax Law at one-half the value of the lands.

The same rule holds as to lands subject to a contract of sale, and also as to personal property held jointly. *Matter of Moebus*, 709.

5. *Constitutional law — sale of land of one person to satisfy debt of another void — limitation of action of ejectment to recover possession of lands conveyed under void tax sale — Tax Law, section 132, construed.* A sale of the land of one person to satisfy a tax assessed against another is void and cannot be validated by a legislative act.

The limitation of actions for the cancellation of a void tax sale under section 132 of the Tax Law, is applicable to an action of ejectment, and the statute begins to run when the tax deed is recorded or the holder of the tax title enters into actual possession.

A tax sale void because violating constitutional limitations cannot be made good by a curative act of the Legislature, but a statute of limitations makes a good defense to one holding under a tax deed when the tax sale was utterly void for jurisdictional defects on constitutional grounds. *Doud v. Huntington Hebrew Congregation*, 748.

6. *Transfer tax — payment of tax under Federal Revenue Act of 1916.* Executors of an estate are not entitled to deduct from the gross estate, as an expense of administration, the estimated tax provided for in the Federal Revenue Act of 1916 before the amount of the transfer tax under the State law is fixed. *Matter of Bierstadt*, 836.

TAX SALE.

When void.

See TAX, 5.

TITLE.

See REAL PROPERTY.

TORT.

See CONVERSION.

See FALSE IMPRISONMENT.

See FRAUD.

See LIBEL.

TRIAL.

When no dismissal on merits.

See APPEAL.

Failure of counsel in opening to refer to essential allegations of complaint — nonsuit.

See NEGLIGENCE, 11.

Action against corporation — burden of proof as to incorporation.

See RAILROAD, 1.

Impeaching testimony without laying foundation.

See TRIAL.

TRUST.

1. *Deed of trust with direction to pay income to use of infant — when duty of administering income devolves upon trustee rather than general guardian — trust for use of infant equivalent to use for support and maintenance.* Where the creator of a trust directed that at the death of a life beneficiary a portion of the corpus of the trust consisting of personal property should continue

TRUST — *Continued.*

to be held by the trustee "the income thereof be applied to the use" of a certain infant until a specified date if he should live until that time and if not then so long as he shall live, the trustee has the duty and right of applying the income directly to the use of the infant and should not be required to pay it over as it accrues to the general guardian of the infant for administration.

Although the trust deed merely directed the trustee to apply the income "to the use" of the infant and did not state that it should be applied to his "support, education and maintenance," the two phrases mean the same thing and involve the same powers and duties. *New York Trust Co. v. Black*, 4.

2. *Apportionment of dividends on stock held by trustees between beneficiaries and corpus* — increase of value in corporate stock through accumulations of profits made by corporation — sale of stock by trustees to corporation itself — partial liquidation of corporate affairs — when life beneficiary entitled to apportionment of increased value of stock sold — trustees — commissions — effect of annual receipt of commissions — waiver. Ordinary cash dividends belong to the life tenant or beneficiary of an estate.

Extraordinary dividends representing accumulated profits, whether distributed in cash or in the form of stock, are to be apportioned between the corpus of the trust and the income, in the proportion in which the surplus thus distributed has been earned before or after the creation of the trust fund. This apportionment is made in order to preserve the integrity of the trust fund and at the same time conserve the rights of the life beneficiary.

When a corporation is liquidated, its assets sold, and the proceeds distributed among its stockholders, an apportionment must be made between the capital of the trust fund and the income, and so much of the sum received by the trustee as represents profits accumulated since the creation of the trust must be attributed to income and paid to the life tenant; otherwise, there would result an increase in the corpus of the fund by accumulations of income, which, except for the benefit of infants, is against public policy and expressly condemned by statute.

Where trustees who are also remaindermen hold one-half of the stock of a domestic business corporation and sell the same to the corporation itself at a time when the value thereof has more than doubled since the creation of the trust, owing to the fact that the corporation retained portions of its profits instead of paying them out by way of dividends, thus enhancing the corporate assets and the value of the stock, there has been in effect a partial liquidation of the corporation and the sum received by the trustees should be apportioned between the capital of the trust fund and the beneficiary under the aforesaid rule which obtains when a corporation is liquidated.

The apportionment should be made in so far as the price received by the trustees on the sale of the stock to the corporation represents accumulated unrestricted profits earned since the creation of the trust. But any increase in the value of the stock not caused by the expenditure upon it of a part of the accumulated profits and any increase in the value of the good will are the legitimate and proper accretions of the corpus of the trust fund and in so far as represented by the price received from the sale of the stock should be accreted by the trustees to capital.

Where the trustees deducted commissions on annual settlements of their accounts they are deemed to have waived any commissions to which they might be entitled in excess of the amount retained by them. *Matter of Schaefer*, 117.

3. *Revocation under section 23 of Personal Property Law* — jurisdiction where trust is executed in and parties are residents of foreign State — consent — beneficial interest in trust. Where a deed of trust of personal property was executed in Massachusetts, and all the parties interested are residents of said State and the property will follow the trustee, an application by the settlor for the revocation of the trust under section 23 of the Personal Property Law of this State should be made to the court in Massachusetts.

A home for aged and indigent persons having an agreement with an inmate and her trustee under which it was to receive from the trustee a certain sum per week, is beneficially interested in the trust so as to make its written consent essential to a revocation under section 23 of the Personal Property Law. *Matter of Berry*, 144.

TRUST — *Continued.*

4. *Deed transferring stock to trustees for benefit of corporation — trust period not measured by lives — unlawful suspension of power of alienation — grantor entitled to decree declaring deed void and requiring trustees to account for dividends, etc.* A deed whereby the owner of stock of a mining corporation conveyed the same in trust to be held by the trustees for the benefit of the stockholders of the corporation, to be disposed of from time to time by a vote of the directors, the dividends thereof to be paid into the treasury of the corporation, unless the same should become insolvent or bankrupt, with power in the trustees to vote upon said stock in their absolute discretion, the dividends, however, in case of the insolvency of the corporation, to be applied as the trustees in their discretion might deem to be for the best interests of the stockholders, with a right in the trustees to sell the stock in their discretion and to apply the proceeds as aforesaid, creates a trust which imposes active duties upon the trustees, and they were not a mere channel of conveyance to vest an absolute property in the beneficiary.

Hence, where the duration of said trust is not measured by lives there is an unlawful suspension of the power of alienation beyond the period allowed by the statute, and the grantor is entitled to a decree declaring the deed null and void and requiring the trustees to deliver the stock to him together with dividends which have been received by them. *Freeman v. Hanna*, 630.

Presumption that duties of executors and trustees are coexistent.

See DECEDENT'S ESTATE, 4.

Gift to surety — will executed within two months of death.

See DECEDENT'S ESTATE, 6.

Assignment by trustee to open a mortgage — consideration — rights of purchaser without notice of prior equities.

See FRAUD, 2.

Agreement not creating trust relationship.

See MORTGAGE, 3.

Gift of stock of private corporation in trust.

See WILL, 3.

Provision for benefit of incompetent — disposition of accumulated income.

See WILL, 6.

UNITED STATES.

[For tables of sections of the United States Constitution and Statutes cited and construed in this volume, see *ante* p. lviii.]

USURY.

Loan — agreement which makes payment of usury optional with borrower — agreement to give bonus in addition to legal interest on sale of patent rights. A loan is not usurious where it leaves the question of payment of a sum in excess of legal interest optional with the borrower upon a condition which it is within his power not to perform.

Thus, an agreement by a borrower of a certain sum of money to pay legal interest thereon until the debt is paid, with an agreement to pay an additional bonus of \$1,250 if he is able to sell or license certain patent rights within six months, or to pay a bonus of \$2,500 if he should sell or license the patent rights at any time after six months, is not usurious, for the borrower does not bind himself to make the sale or give the license and hence it is optional with him whether he will pay usury. *Diehl v. Becker*, 12.

UTICA, CITY OF.

Elimination of grade crossings — right of adjoining owner to damages.

See EMINENT DOMAIN, 1.

VENDOR AND PURCHASER.

Specific performance of contract to convey land — effect of municipal ordinance regulating use of land enacted between date of contract and consummation thereof — when purchaser will not be compelled to take property — when municipal ordinance may be attacked as unreasonable. Where an owner of a plot of land agrees to convey free from all incumbrances, except a covenant against nuisances, and the purchaser agrees to buy upon said terms, intending

VENDOR AND PURCHASER — *Continued.*

to erect upon the property a business building, and having no other use for the property, and at the time of the execution of the contract there is no restriction upon the use to which the property may be put except the covenant against nuisances, and between said date and the day upon which the sale is to be consummated the board of estimate and apportionment of the city of New York, acting under legislative authority, adopts a resolution preventing the use of the property intended by the purchaser, which resolution could not have been reasonably anticipated by the parties, a court of equity will not compel the purchaser to specifically perform his agreement.

As a general rule, a purchaser will not be compelled to take property, the possession of which he will be obliged to defend by litigation.

The resolution of the board of estimate and apportionment adopted under authority of the Legislature, but not specifically ratified after adoption, may be attacked upon the ground that it is unreasonable, and to support this claim evidence may be introduced. *Anderson v. Steinway & Sons*, 507.

VENUE.

False imprisonment.

See PRACTICE, 3.

Action between non-residents.

See PRACTICE, 4.

WAIVER.

When rule that only one recovery may be had on same cause of action is waived.

See MASTER AND SERVANT, 5.

Allegations on contract and in tort — waiver of tort.

See PLEADING, 2.

Time limit set for delivery of goods.

See SALE, 4.

Commissions of trustees.

See TRUST, 2.

WATERS AND WATERCOURSES.

Title to lands below high-water mark.

See REAL PROPERTY, 1.

Easements of riparian owners in lands formerly under water — action of ejectment — respective rights of sovereign and owners.

See REAL PROPERTY, 4.

WILL.

1. *Evidence not establishing undue influence or lack of testamentary capacity — disability of old age not equivalent to testamentary incapacity — evidence — declarations of testator, when incompetent on issue of undue influence — declarations subsequent to execution of will — declarations of testator's wife — testimony of legatee under former will.* Action to determine the validity of the probate of a will pursuant to the provisions of section 2653a of the Code of Civil Procedure, the plaintiff, a grandson of the testator, alleging lack of testamentary capacity, fraud and undue influence. The testator at the time of his death was about eighty-one years old, and the will had been executed about four months previous, and had been preceded by at least three other wills. Aside from a legacy to his sister-in-law, who lived with him, he left the bulk of his property to his second wife and to his children by her. The plaintiff is a grandson through a former wife, from whom the testator had been divorced.

Evidence examined, and held, insufficient to establish either lack of testamentary capacity, fraud or undue influence, and that a judgment for the plaintiff should be reversed and his complaint dismissed.

A declaration by the testator that he was transferring property to his wife with a view of protecting his children is no indication of his incompetence and is consistent with an intelligent judgment that he has sufficient confidence in his wife to look after her own and his children.

Nor is incompetence shown by his yielding to the suggestions of a friend who urged him not to satisfy certain mortgages on lands owned by a

WILL — Continued.

corporation which he controlled, so that his children should be less dependent upon their mother.

More age and the attendant impairment of physical and mental faculties does not make one incompetent to make a will.

Declarations made by the testator prior to the execution of the will, while competent on the question of testamentary capacity if not too remote, are mere hearsay, and, therefore, incompetent upon the issue of undue influence.

Declarations of the testator showing his state of mind a few hours before his death, when aroused from a comatose condition, shed no light on his state of mind at the time of the execution of a will, three months before, and especially so as respects the issue of undue influence.

Testimony by a nurse attending the testator in his last illness to the effect that the testator's wife stated that he talked and acted foolishly after receiving a slight injury, which declarations were made long subsequent to the execution of the will, would only be admissible for the purpose of impeaching the widow as a witness, after a proper foundation had been laid therefor by asking her if she had not so stated.

Quere, as to whether a legatee under a prior will of the testator is debarred by section 829 of the Code of Civil Procedure from testifying to declarations of the testator when making said will, where there was another will intervening between said will and that offered for probate, such witness not deriving his interest under an immediately preceding will.

In any event, such declarations to the effect that the testator did not feel free to state his views with respect to the disposition of his property in the presence of his wife and sister-in-law do not tend to show undue influence upon the testator at the time he executed a later will. *Lester v. Lester*, 438.

2. *Construction — when terms "nephews and nieces" do not include grand-nephews and grandnieces — gift by implication.* The terms "nephews and nieces" in their primary and ordinary sense do not include grandnephews and grandnieces or more remote descendants unless there is something in the will to show that the words were used in the broader sense.

Where a will by express terms in different clauses gives property to the "nephews and nieces" of the testatrix, and the language used is not of a doubtful or uncertain effect, the other parts of the will cannot be resorted to to determine the meaning of said words.

Provisions of a will examined, and held, that it was the intention of the testatrix to use the terms "nephews and nieces" in their primary and ordinary sense, and that said terms did not include the children of a deceased nephew.

In order to support a gift by implication, the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to present no other reasonable inference. *Matter of Van Riempest*, 475.

3. *Will construed — gift of stock of private corporation in trust for purpose of perpetuating family control — trust period limited to two lives — trust valid.* A will stated in substance that the testator and his brother owned the "controlling interest" in the stock of a business corporation, and that, whereas the testator and his brother had agreed, so long as they owned such controlling interest, to hold and use the same for their mutual benefit and for the control of the corporation, and as they had agreed not to sell their holdings separately, except to one another, the testator directed his executors to reserve said stock which he gave to them in trust so long as his brother held the stock now owned by him, and directed the executors to vote on said stock in conjunction with said brother for the joint benefit of the estate, and not to sell or dispose of the shares except to said brother, or with his consent, unless or until the said brother should sell the stock now owned by him, subject to the prior termination of the reservation by the death of the testator's wife and daughter. By subsequent clauses the trust was to end on the death of the testator's wife and daughter, while the reservation as to the sale or disposition of the stock was to terminate upon the happening of either of two conditions, first, the sale by the testator's brother of his stock, and second, the death of the tes-

WILL — Continued.

tator's wife and daughter, when the trust was to terminate and the proceeds be distributed.

Held, that the trust, being limited to the duration of two lives in being was valid.

As the clearly expressed intention of the testator, as shown by his will and other evidence, was to preserve the family control over the corporation, the stock of which was held only by members of the family, and which was in effect a "close corporation," the court will not read into said will, as a condition for the continuance of the trust, a requirement that at the testator's death his brother had not disposed of any stock held by him when the will was made, and hence it is immaterial that said brother transferred certain shares of his stock to his wife, or that the testator had also transferred stock to the same person for the purpose of protecting the same upon a threatened insolvency.

Nor did the provision of said will mean that the testator and his brother must own a majority of the stock of the corporation at the time of the testator's death, for the term "controlling interest" did not necessarily mean a majority holding, but merely a holding of sufficient stock to control the management of the corporation. *Matter of Toch*, 544.

4. *Will construed — gift to widow for life with remainders to nephews and nieces — when remainders not vested but contingent upon remaindermen surviving widow — foreclosure — distribution of surplus.* A will by which the testator gives his estate to his widow for life and at her death directs his property to be converted into cash and the proceeds divided between his nieces and nephews and the survivor or survivors of them, share and share alike, and to their "heirs and assigns forever," does not give to the nieces and nephews a vested remainder in the realty during the lifetime of the widow.

As there was a direction to pay or divide the estate at a future time there was no immediate gift, and the vesting of the remainders in the beneficiaries does not take place until the time of the division arrives.

The rule against a construction which will disinherit heirs is usually applied to those nearer in blood than grandnephews and grandnieces and rests upon the presumption that the testator intends a bounty to his descendants.

Hence, the descendants of nephews and nieces who died before the widow are not entitled to share in a distribution of surplus arising on a sale on foreclosure.

The will will be construed as aforesaid although the testator devised to "the heirs and assigns" of the nephews and nieces. *Byrer v. Finnen*, 671.

5. *Will construed — when payment to descendants per capita and not per stirpes — rules of construction — use of words "lawful descendants" and "issue."* A testator devised the proceeds of certain property in trust for the benefit of his daughter during her life and provided that at her death the principal should be paid "to her lawful descendants." Provisions of the will examined, and *held*, that it was the intention of the testator from the use of the words "lawful descendants" that payment should be made to such descendants *per capita* and not *per stirpes*, although in subsequent portions of the will he provided that the "children" and "issue" of certain persons were to take *per stirpes*;

That a child conceived before the death of the person upon whose life the remainder was limited and born thereafter was entitled to share in such funds.

If in one part of a will a given word or phrase is so restricted or expanded by accompanying explanation that the word or phrase is endued by the testator with a secondary meaning, however eccentric, the same word or phrase when again found in the same instrument may be given the same meaning; but identity of the word requiring construction with the like word elsewhere in the instrument is essential to the application of this doctrine.

When having once used for his testamentary purpose his own conception of the word "issue," the testator rejects that word in a later portion of the will, he at least suggests the possibility that in refusing the word once used and laying hold of another, he intended not merely a departure in

WILL — Continued.

expression, but a change in purpose, which was substantial. *Matter of Voight*, 751.

6. *Will construed — trust for benefit of incompetent — disposition of accumulated income — gift of entire income subject to payment of specific bequests.* A testator created a trust for the benefit of his incompetent daughter who was his only heir at law. Provisions of the will examined, and held, that a gift was created to the daughter of the entire income from the trust fund, subject to the payment of certain specific bequests;

That the trustees are administrators of the income and not disposers thereof, and have no power to use the same to increase the shares of the residuary legatees;

That their discretion is limited to determining how much of the income shall be expended for the benefit of the daughter during her incompetence, and that they are made custodians of the balance;

That there was no direction for an illegal accumulation of income. *Crawford v. Dexter*, 764.

7. *Probate contested on grounds of fraud and undue influence — evidence not justifying verdict for contestants — evidence — past transactions showing family history.* Appeal from a decree of the Surrogate's Court denying probate of a will upon the ground that the execution thereof was procured by fraud, deceit and undue influence. The testatrix left her estate to her daughters and gave to her sons only nominal bequests upon the ground stated in the will that they had, during her husband's lifetime, received ample advancements from him, etc. Evidence examined, and held, absolutely insufficient to support a finding of fraud or undue influence by the jury, and that the decree of the surrogate should be reversed and the will admitted to probate.

In such proceeding in the Surrogate's Court it was error to take evidence otherwise clearly inadmissible, upon the theory that it would place upon the record the whole history of the family of the testatrix. *Matter of Sweeney*, 780.

Power of sale construed — when condemnation of land equivalent to sale. See ASSIGNMENT.

Jurisdiction of surrogate to act upon prior joint will or contract. See SURROGATE.

WITNESS.

When medical witness may stipulate for compensation. See EVIDENCE.

WORKMEN'S COMPENSATION LAW.

1. *Hazardous employment — employee injured while placing threshing machine in barn — farm laborers.* A man who is traveling through the country with a threshing machine and stopping from place to place to thresh for farmers for compensation, is not engaged in farming and his employees are not farm laborers.

A day laborer employed in working and moving such a machine injured while putting the machine in a barn, by the wheels striking an obstruction, throwing the wagon tongue against him, was engaged in the operation of a vehicle, a hazardous employment, within the meaning of the Workmen's Compensation Law. *White v. Loades*, 236.

2. *Admissibility of hearsay evidence as to accidental injury — evidence as to death of superintendent of construction on barge canal, resulting from peritonitis caused by fall — presumption.* Hearsay evidence as to whether or not a decedent had suffered an accidental injury sufficient to warrant an award under the Workmen's Compensation Law is admissible in the discretion of the State Industrial Commission.

Where the death of a superintendent of construction of a section of the barge canal resulted from acute peritonitis, which might have been caused by the rupture of the appendix, and there was no eye witness of the happening of the alleged accident, and it was not confirmed by any marks upon the skin or by other external sign, and the sole evidence of its occurrence was found in the employer's first report of the injury and in the hearsay evidence of the wife, son and attending physician of the deceased

WORKMEN'S COMPENSATION LAW — Continued.

that he said that his foot slipped while he was attempting to climb out of the prism of the canal, and that he fell down the bank, striking his abdomen, causing severe pain, and that he told his wife that "something broke inside," the State Industrial Commission was justified in finding that the deceased sustained an accidental injury sufficient to warrant the making of an award.

The presumption created by section 21 of the Workmen's Compensation Law was not overcome by substantial evidence. *Lindquist v. Holler*, 317.

3. *Amputation of one-fourth of an inch of tip of one finger not the loss of one-half thereof.* The loss by amputation of approximately one-fourth of an inch of the tip of one of a claimant's forefingers, no claim being made of any further injury to the finger, does not constitute the loss of the first phalange so as to warrant an award for the loss of one-half the finger. *Thompson v. Sherwood Shoe Co.*, 319.

4. *Where engineman struck by train while going to collect his wages after completing his day's work not injured in course of his employment — injuries while walking along track in violation of Railroad Law, section 83.* Where a yard engineman, after turning in his engine and his slip showing that his run had been completed, although there were plenty of streets by which he could have left the railroad yard for the purpose of going home, walked along the tracks for a distance, crossed over another public highway which he had gained in safety and then entered on the right of way of an elevated railroad conducted by his employer, for the purpose of catching a passing freight train in order to arrive at a certain place to collect his pay, and was struck and killed by such train, the injuries resulting in his death cannot be held to have arisen out of and in the course of his employment within the meaning of the Workmen's Compensation Law.

But there may be cases in which an employee in going for his wages may be considered as acting in the course of his employment.

As the decedent was not employed on the line where the accident happened, he was a mere trespasser at that point, violating the spirit if not the letter of section 83 of the Railroad Law (Laws of 1910, chap. 481). *Ames v. New York Central Railroad Co.*, 324.

5. *When employee, injured while installing engine for paper manufacturer, not engaged in a hazardous employment.* Where a person in the business of moving heavy machinery was engaged by a paper company carrying on a hazardous business within the meaning of group 15 of section 2 of the Workmen's Compensation Law, to install an engine, he was not engaged in a hazardous employment within said provision of the statute, nor is he entitled to avail himself of the provisions of group 42 of said section, which specifically includes the installation of "engines or heavy machinery."

The paper company did not carry on the occupation of installing engines or heavy machinery for a pecuniary gain within the meaning of subdivision 5 of section 3 of the statute. *McNally v. Diamond Mills Paper Co.*, 342.

6. *Election of remedies — when decision to claim under statute conclusive.* Where an employer has not secured compensation to his employees, as required by section 50 of the Workmen's Compensation Law, an employee may, under sections 52 and 11 of the statute, at his option, elect to claim compensation thereunder or to maintain an action for damages, but he cannot have the benefit of both remedies, and an election once made, intelligently and with knowledge of the facts, is conclusive.

Where a claimant with full knowledge of the situation before an award was made, and with competent counsel permitted the award in his favor, he thereby confirms his election to accept such remedy.

A party must not experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him, and then, if dissatisfied, repudiate the award and seek the other remedy permitted by the statute. *Pavia v. Petroleum Iron Works Co.*, 345.

7. *Hazardous employment — manufacture of butter — group 33 of section 2 of Workmen's Compensation Law construed.* The manufacture of butter is not a hazardous employment within the meaning of group 33 of section 2 of the Workmen's Compensation Law, which provides that hazardous employments shall include the following: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries."

WORKMEN'S COMPENSATION LAW — Continued.

Hence, compensation cannot be allowed under said provision for the death of an employee of a grocery company resulting from blood poisoning caused by an injury to his hand while packing butter in tubs. *Pardy v. Boomhower Grocery Co.*, 347.

8. *Hazardous employment — weighing hides constituting cargoes unloaded from vessels — accidental injury — injury to employee from anthrax germs while handling hides.* An employee engaged in weighing hides on piers, which hides constitute cargoes or parts of cargoes unloaded from vessels, is engaged in a hazardous employment within the meaning of group 10 of section 2 of the Workmen's Compensation Law.

Such an employee who, while handling dirty and diseased hides, was infected by anthrax germs through an abrasion in his hand, previously sustained while handling hides covered with wet salt, sustained an accidental injury within the meaning of subdivision 7 of section 3 of the statute.

Moreover, because of the previous abrasion on the hand of the employee, the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result from such injury within the meaning of the statute." *Hiers v. Hull & Co.*, 350.

9. *Application to foreign corporation engaged in interstate commerce — injury to engineer of tug owned by foreign corporation.* A resident of this State employed as chief engineer of a tug owned by a corporation having its principal place of business in the State of Georgia but enrolled or registered in the custom house in the port of New York, and engaged in interstate commerce between Atlantic ports, is not entitled to the benefit of the Workmen's Compensation Law for injuries sustained while on Long Island sound, en route between Portland, Me., and New York city.

The Workmen's Compensation Law does not undertake to charge corporations of a sister State or of a foreign government carrying on interstate or foreign commerce with the burdens thereof. *Charlton v. Hilton-Dodge Transportation Co.*, 385.

10. *Injury to right side resulting in acute pericarditis — evidence — when findings of State Industrial Commission conclusive — appeal — when Appellate Division permitted to interfere.* An employee of one conducting the business of erecting silos fell into a well hole in such a manner as to strike against a center pole used in the construction of a silo, producing a contusion of his right side, and subsequently developed acute pericarditis with a serofibrinous exudate, resulting in his death. Evidence examined, and held, that the conclusion of fact by the State Industrial Commission that death resulted from the injuries sustained, should be affirmed.

Where there is any evidence fairly calculated to establish the essential facts, the policy of the law requires that the finding of the State Industrial Commission shall be supported.

The Appellate Division is not permitted in such a case to consider the weight of evidence in the ordinary sense, for it is only when there is no evidence of probative force that it is permitted to interfere. *La Fleur v. Wood*, 397.

New Jersey statute — action brought here — preliminary examination in New Jersey essential prerequisite.

See MASTER AND SERVANT, 3.

